

CODE *of* CIVIL PROCEDURE



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THE CODE OF CIVIL PROCEDURE

[Including Pleadings]

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(Revised and Enlarged)

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FOREWORD

I have gone through portions of Sri Mahesh Prasad Tandon's commentary on the Code of Civil Procedure. The learned author has taken great pains over its preparation. The book is intended primarily for the use of students and young practitioners and for their purposes it is admirably suited. What is most essential in their case is to give them an accurate idea as to what happens to a suit from the date of its institution to its final decision and execution. In order to achieve this object the author has departed from the usual practice of commentators in taking sections one by one and commenting on every important word contained therein. His scheme is to take a group of sections and to reproduce the subject dealt with by them in a narrative form so as to present to the reader a complete and intelligible picture of the procedure contained therein. I am sure this work will prove useful to persons for whom it is intended.

It is very creditable for the learned author to find time in the midst of his official career to carry on literary activities. I understand he has brought out several other useful works also. I wish him all success in his literary enterprise.

Brij Mohan Lall,
Judge High Court,
Allahabad.

PREFACE TO THE THIRTEENTH EDITION

The authors appreciate the very cordial reception to the first twelve editions of the text-book on the Code of Civil Procedure.

The present edition incorporates the extensive amendments made in the Code by the Code of Civil Procedure (Amendment) Act, 1976. The Amendment Act has introduced important changes aimed at speedy and fair justice. It has sought to give effect to many recommendations made by the Law Commission in its various reports on civil procedure. The joint Committee of both Houses of Parliament, while suggesting amendments, kept in view the twin objective of fair trial and expeditious disposal of suits and proceedings. To cut delays in disposal of civil cases provisions regarding service of summonses on the defendants, appearance and filing of written statements by the defendants, filing of documents by parties, summoning and enforcing the attendance of witnesses on commission, adjournments and temporary injunctions have been streamlined. The categories of suits which might be tried by a court in a summary manner have also been enlarged. Steps have been taken to discourage adjournments which cause delays. Provision has been made to ensure speedy delivery of judgments. Restrictions have also been imposed on the right of appeal. To help the poorer sections of the society who do not have the means to engage pleaders to pursue their cases to get a fair trial, a new rule has been added permitting the court in certain circumstances to assign a pleader to a person who has been permitted to sue as an indigent person but not represented by a pleader. Further a person is not to be detained in civil prison in execution of a decree if the amount of the decree does not exceed Rs. 500.

The text of the book, besides incorporating the latest changes, have been revised, and essential principles culled from recent authoritative decisions of the Supreme Court and the various High Courts on the subject since the publication of the last impression have been integrated in condensed language so as to keep it a well-knit book of manageable size.

M. P. Tandon
Rajesh Tandon

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THE CODE OF CIVIL PROCEDURE

(Act V of 1908)

An Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature.

Whereas it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature ;

It is hereby enacted as follows :

PRELIMINARY

(Ss. 1—8)

1. Short title, commencement and extent.—(1) This Act may be cited as the Code of Civil Procedure, 1908.

(2) It shall come into force on the first day of January, 1909.

(3) It extends to the whole of India except—

(a) the State of Jammu and Kashmir ;

(b) the State of Nagaland and the tribal areas :

Provided that the State Government concerned may, by notification in the *Official Gazette*, extend the provisions of this Code or any of them to the whole or part of the State of Nagaland or such tribal areas as the case may be, with such supplemental, incidental or consequential modifications as may be specified in the notification.

Explanation.—In this clause, “tribal areas” means the territories which, immediately before the 21st day of January, 1972, were included in the tribal areas of Assam as referred to in paragraph 20 of the Sixth Schedule to the Constitution.

(4) In relation to the Amindivi Islands and the East Godavari, West Godavari and Vishakhapatnam Agencies in the State of Andhra Pradesh and the Union territory of Lakshadweep, the application of this Code shall be without prejudice to the application of any rule or regulation for the time being in force in such Islands, Agencies or such Union territory, as the case may be, relating to the application of this Code.

Short History.—The first Code of Civil Procedure was Act VIII of 1859. Before that the procedure of the Mofussil Courts was regulated by special Acts and Regulations which were repealed by Act X of 1861. In 1862 the Supreme Courts and the Courts of Saddar Diwany Adalat in the Presidency Towns were abolished by the High Courts Act, 1861, and their powers were vested in the Chartered High Courts. The Letters Patent of 1862 establishing the High Courts extended to them the procedure of the Code of 1859. Subsequent amending Acts were passed in 1860, 1861, 1863, 1867, 1870, 1871, and 1872.

In spite of several amendments it was found that the Code of 1859 was ill-drawn, ill-arranged and incomplete, with the result that a fresh Code, Act X of 1877, had to be passed repealing that of 1859. Five years after, this Code was superseded by the Code of 1882, Act XIV of 1882. Finally after various amendments to the Code of 1882, there emerged the present Code of Civil Procedure in the year 1908, viz., Act V of 1908.

With the division of India into India and Pakistan, both the dominions passed various amending Acts to adapt the Code to the changed circumstances. The Code of Civil Procedure Amending Act, 32 of 1949, was passed by the Dominion Legislature of India, and the Code was further modified by Acts 2 and 19 of 1951, Act 48 of 1952 and Act 42 of 1953. With a view to reducing delay and expense the Code was further amended by the Code of Civil Procedure (Amendment) Act, 1956 (No. 66 of 1956) and having received the assent of the President on the 2nd of December, 1956, it came into force on the 1st of January, 1957. Clause (1) of Art. 133 of the Constitution of India with regard to the appellate jurisdiction of the Supreme Court in appeals from High Court in regard to civil matters was amended by the Constitution (Thirtieth Amendment) Act, 1972, and as a consequential measure the Code of Civil Procedure (Amendment) Act 1973, was enacted which amended S. 109 and omitted S. 110 of the Code of Civil Procedure so far as these sections laid down the criteria for evaluation of property or the subject-matter of dispute for purposes of appeal to the Supreme Court. An appeal now lies to the Supreme Court only if the High Court certifies that the case involves a substantial question of law of general importance, and that in the opinion of the High Court the said question needs to be decided by the Supreme Court. Connected provisions in rules 3, 4 and 5 of O. XLV and Form No. 12 in Appendix G of the First Schedule to the Code have also been amended by substitution of the revised provisions of rule 3 and omission of rules 4 and 5.

The Code of Civil Procedure (Amendment) Act, 1976, (Act No. 104 of 1976), has made extensive changes in the body of the Code and implemented the recommendations made by the Law Commission of India in its various reports on civil procedures. The amendments keep in view the twin objective of fair trial and expeditious disposal of suits and proceedings.

Scheme.—As regards the scheme of the present Code of Civil Procedure, it consists of two parts, the first containing 158 sections, called the body of the Code, and the second containing 51 Orders in Schedule I, called the rules. The first part contains provisions of a substantive nature, which lay down the general principles and create jurisdiction, while the second contains provisions which relate to procedure and indicate the mode in which jurisdiction created by the body of the Code has to be exercised. The body of the Code is fundamental. It cannot be altered except by Parliament. The various High Courts are empowered to annul, alter, or add to, all or any of the said rules, embodied

in the second part of the Code, provided that such annulment, alteration and addition are not inconsistent with the provisions of the first part of the Code. The body of the Code being expressed in general terms has to be read in conjunction with the rules prescribing the details. To ascertain the jurisdiction of the court in a particular manner not only the Code but also the rules which may have set limits to the exercise of it have to be looked. (*Suchindra v. Usha*, 1949 Cal. 690). The sections lay down the general principles while the rules provide the means by which they can be applied. If, however, the rules are inconsistent with the body of the Code, *i. e.*, sections, the latter would prevail.

The Code of Civil Procedure is an adjective law and is not intended to create new, or to take away existing, rights. It is intended mainly to regulate procedure in civil courts.

The Code of Civil Procedure deals with procedural matters, that is, with matters relating to the machinery for the enforcement of substantive rights, as contra-distinguished from the substantive rights themselves. As to the latter rights, one must look elsewhere, that is, to the statute law or the general principles of law. Even in matters relating to procedure, it is recognised that all procedure should be accepted to be permissible unless it is prohibited by the Code of Civil Procedure either expressly or by necessary implication. [*Thakar Lal v. Nathulal*, I.L.R. (1964) Raj. 353.]

Scope.—The Code is not exhaustive. It is exhaustive on the matters in respect of which it declares the law, on any point specifically dealt with by it. (*Gokul v. Padmanund*, 29, C. 707 P. C.). In respect of the matters specifically provided, the court cannot disregard or go outside the letter of the enactment according to its true construction. But the Code has not made extensive provisions against all contingencies. It confers powers on a court, but does not restrict and delimit its unlimited powers. Thus with regard to matters with which the Code does not deal the court has an inherent power to act according to justice, equity and good conscience and to decide the matter upon general principles. (*Hukumchand v. Kamalanand*, 33 C. 927). Section 151, C. P. C., specifically provides that nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. It is a saving clause which empowers the court to do justice between the parties as is warranted under the circumstances or demanded by the exigencies of the case.

The Code also does not exempt foreigners from its operation. (*Smith v. The Indian Textile Company*, 49 A. 669).

Object.—According to the preamble the object of the present Code is to consolidate and amend the laws relating to the procedure of the courts of civil judicature. A Code itself is a consolidation of the statute law, or a statute collecting all the law relating to a particular subject by bringing it up to date. The great advantage of codification is that it brings about simplicity, symmetry, intelligibility and logical coherence.

Extent.—The Code extends to the whole of India except (a) the State of Jammu and Kashmir ; (b) the State of Nagaland and the tribal areas.

It extends also to the Scheduled Areas of the erstwhile State of Madras, viz., the Amindivi Islands (now called 'Lakshadweep'), the East Godavari, West Godavari and Visakhapatnam Agencies.

DEFINITIONS

2. Definitions.—In this Act, unless there is anything repugnant in the subject or context—

✓(1) “Code” includes rules ;

✓(2) “decree” means the formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

✓(3) “decree-holder” means any person in whose favour a decree has been passed or an order capable of execution has been made ;

✓(4) “district” means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a “District Court”), and includes the local limits of the ordinary original civil jurisdiction of a High Court ;

(5) “foreign court” means a Court situate outside India and not established or continued by the Central Government ;

(6) “foreign judgment” means the judgment of a foreign Court ;

(7) “Government Pleader” includes any officer appointed by the State Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader ;

(7-A) “High Court” in relation to the Andaman and Nicobar Islands, means the High Court in Calcutta ;

(7-B) “India” except in sections 1, 29, 43, 44, 44-A, 78, 79, 82, 83 and 87-A means the territory of India excluding the State of Jammu and Kashmir ;

(8) "Judge" means the presiding officer of a Civil Court ;

(9) "Judgment" means the statement given by the Judge of the grounds of a decree or order ;

(10) "judgment-debtor" means any person against whom a decree has been passed or an order capable of execution has been made ;

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued ;

(12) "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession ;

(13) "movable property" includes growing crops ;

(14) "order" means the formal expression of any decision of a Civil Court which is not a decree ;

(15) "pleader" means any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court ;

(16) "prescribed" means prescribed by rules ;

(17) "public officer" means a person falling under any of the following descriptions, namely—

(a) every judge ;

(b) every member of an All-India Service ;

(c) every commissioned or gazetted officer in the military, naval or air force of the Union, while serving under the Government ;

(d) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to

administer any oath, or to interpret, or to preserve order, in the Court, and every person especially authorised by a Court of Justice to perform any of such duties ;

(e) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;

(f) every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience ;

(g) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue-process, or to investigate, or to report on, any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government ; and

(h) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty ;

(18) "rules" mean rules and forms contained in the First Schedule or made under section 122 or section 125 ;

(19) "share in a corporation" shall be deemed to include stock, debenture stock, debentures or bonds ; and

(20) "signed", save in the case of a judgment or decree, includes stamped.

Code.—According to S. 2 (1) "Code" includes "rules".

Decree.—Section 2 (2) of the Code defines the term "decree" so as to mean the formal expression of an adjudication which, as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy, such adjudication being in a suit. The definition further says that "decree" shall include the rejection of a plaint (O. 7, r. 11) and the determination of any question within S. 144, but shall not include—(a) any adjudication from which an appeal lies as an appeal

from an order (See O. 43) or (b) an order of dismissal for default. (See O. 9, rr. 2, 8).

Essentials of a decree.—An analysis of the definition of the decree quoted above will show that the term includes the following essential elements :

1. There must be a formal expression of adjudication. All requirements of form must be complied with. The term “formal expression of an adjudication” connotes the adjudication granting or refusing any of the reliefs claimed in the plaint and embodied in a formal declaration. An ‘order’ clothed in the form of a decree will not make it a decree. If a decree has not been formally drawn up in terms of the judgment, no appeal lies from the judgment. But a misdescription of a decision as an order which amounts to a decree does not make it any the less a decree. All formal expressions would, however, not amount to a decree unless the subsequent conditions are also complied with.

2. The adjudication must have been given in a suit. Every suit is commenced by filing a plaint in a civil court. There cannot be a decree unless the suit has been filed. A decree is an indispensable part of a suit carried out to its logical conclusion. Rejection of an application for leave to sue in *forma pauperis* is not a decree within the meaning of the term for there is no plaint unless such application is granted and there is consequently no decision in a suit.

3. It must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit. An order of dismissal for default of appearance is no determination of the rights of the parties and, therefore, is not a decree. Similarly, decision on an application by a person to be added as a party to the suit on the ground of his interest in the subject-matter of the suit is not a decree for it is not a decision on the rights of the parties. It has been held that the expression “matters in controversy” must not be understood as relating solely to the merits of the case. It would cover any question relating to the character and status of a party suing, to the jurisdiction of the court, to the maintainability of a suit and to other preliminary matters which necessitate an adjudication before a suit is inquired into. It, however, does not include proceedings preliminary to the institution of a suit, e. g., an application for leave to sue as a pauper. (*Ankala Venkata Reddy v. Manchala Venkata Reddy*, 29 I. C. 393).

The term “parties” refers to parties to the suit. An order on a stranger’s application to be brought on the record as legal representative is not a decree.

By the phrase “rights of the parties” is meant substantive rights of the parties and not a procedural right. In general they mean rights of the parties *inter se* in the subject-matter of the suit and include general rights, such as those relating to status, jurisdiction, limitation, frame of suit, accounts, etc., which, if decided, must have a general effect upon the proceedings in the suit. (*Narayan Balkrishna Kulkarni v. Gopal Jiv Ghadi*, 16 Bom. L. R. 306).

4. Such determination must be of a conclusive nature. The decision must be one which is complete and final as regards the court which passes it. Where, therefore, the question sought to be adjudicated is left open, there is no decree. The question that falls for determination in such cases is whether the decision is a final one in its essence or substantially. If it be so, the adjudication is a decree.

It is only when all the four conditions are fulfilled that the adjudication is termed a decree.

Preliminary and Final Decrees

A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. Such a decree determines the right of the parties with regard to some or one of the matters in controversy in the suit but does not completely dispose of the suit. Such decrees are passed in suits for possession and mesne profits, in administration suits, in pre-emption suits, in suits for dissolution of partnership, in accounts between the principal and agent, in partition suits, in mortgage suits, in suits for foreclosure, in redemption suits, in suits for sale, etc. The cases where the legislature contemplates a preliminary decree are specified in O. 20, rules 12 to 18, and O. 34, rules 2 to 8.

The function of the final decree is merely to restate and apply with precision what the preliminary decree has ordained. The decrees are in the same suit and if the preliminary decree is set aside the final decree is automatically superseded.

A preliminary decree ascertains what is to be done, while the final decree states the result achieved by means of the preliminary decree. (*Kamuni Devi v. Promotho Nath Mukerjee*, 27 I. C. 317). The preliminary decree is not dependent on the final one, but the latter is really dependent on and subordinate to the former which is not extinguished by the passing of the final decree. (*Bibi Wahidunnissa v. Dip Narain Pershad*, 35 I. C. 873, F. B.).

Whether a decree is final or preliminary or partly preliminary and partly final has to be determined only by reference to the decree itself and not by the description given to the decree by the parties.

Where preliminary and final decrees are necessary the preliminary decree declares the rights of parties and the final decree carries into fulfilment the preliminary decree and divides the properties specifically by metes and bounds in terms of the right declared under the preliminary decree thereby completely disposing of the suit. An executable decree is secured to the parties. The Court does not preclude the passing of a more than one final decree and itself contemplates the possibility of a composite decree, that is, a decree partly preliminary and partly final. [*Varatharajulu Reddiar v. Venkatakrishna Reddiar*, I. L. R. (1967) 1 Mad. 136].

Thus in a suit between the principal and agent or between the partners for accounts and recovery of such amount as may be found due on taking account, the court first finds that the relationship of principal and agent or that of partners existed between the parties and the plaintiff is entitled to accounts. This is the preliminary decree, for a substantive right is determined thereby between the parties. Now when the actual amount due has been determined, the court passes a decree ordering the defendant to pay the amount to the plaintiff. This is the final decree.

There should be only one preliminary decree in a suit to be followed by one final decree. But a second preliminary decree in a suit of partition is not impossible where there are facts or circumstances alleged to have come into existence after the passing of the first. (*Bhartendu v. Yakub Husain*, 11 A. L. J. 120). In a partnership suit, however, where there are several

preliminary issues, the Code contemplates passing of several preliminary decrees.

A decree may be partly preliminary and partly final. In a suit for possession of land and mesne profits, the court orders possession of the land in suit in favour of the plaintiff, and directs an inquiry into profits. The first part of the decree is final as it directs delivery of possession to the plaintiff, while the second part is preliminary inasmuch as it directs an inquiry as to mesne profits.

Where the court finds that the frame of the suit is bad, but gives time to the plaintiffs for amending the plaint, the finding of the court on the frame of the suit does not amount to a preliminary decree nor does it conclusively determine the rights of the parties with regard to any of the matters in controversy and therefore no appeal lies against that finding.

Appeal from final decree in the absence of an appeal from preliminary decree.—Where any party aggrieved by a preliminary decree does not appeal from such a decree within the period of limitation allowed for appeals, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree. (S. 97).

The object of S. 97 is to prevent preliminary questions being raised in the form of appeal after a case has been decided on the merits. There is unanimity of opinion in all the High Courts that a pending appeal against a preliminary decree does not become infructuous by the passing of the final decree. An appeal from a preliminary decree can be heard, although, during its pendency, a final decree is passed, but is not appealed against. (*Kanhaiya Lal v. Tribeni Sahai*, 6 All., 532). As regards the point whether an appeal can be preferred against the preliminary decree even *after* the final decree has been passed, the High Courts of Allahabad, Madras and Patna have consistently taken the view that the mere fact that no appeal has been preferred from the final decree is no ground for not hearing the appeal from the preliminary decree, whether the latter appeal is filed before or after the final decree; if the preliminary decree is set aside, the final decree falls with it. (*Kanhaiya Lal v. Tribeni Sahai*, 36 All., 532, and *Lakshmi v. Maru Devi*, 27 Mad. 29). The basis of the view is that the final decree is dependent on the preliminary decree and that, if the latter is set aside on appeal, the former falls with it. The High Court of Calcutta at one time differed from this view. The conflict has now been set at rest by the Full Bench decision of that Court in *Taleb Ali v. Abdul Aziz* (57 Cal. 1013) in which the view of the Allahabad, Madras and Patna High Courts has been adopted as the correct one.

Section 97, however, does not prevent a party from filing a combined appeal against both the preliminary and final decrees if the dates permit him to do so.

The effect of the reversal of the preliminary decree on the final decree passed by the lower court during the pendency of the appeal against the preliminary decree is that the final decree is superseded because the final decree is in its nature dependent and subordinate, as it is a decree which has been passed as a result of proceedings directed and controlled by the preliminary decree and based thereon. Therefore, when a preliminary decree is set aside

on appeal the final decree automatically falls to the ground, whether the appeal was brought before or after the passing of the final decree.

It has, however, to be clearly understood that the right to appeal lies only from a preliminary decree and not from a preliminary finding in a suit. Where there is only a preliminary finding and no decree is drawn up, there is no preliminary decree and consequently no appeal lies under S. 97 of the Code.

Questions within S. 144.—The definition of the “decree” further includes the rejection of a plaint and determination of any question under S. 144. Section 144 deals with restitution and the determination of a question under that section is a decree and is as such applicable.

Prior to the Code of Civil Procedure (Amendment) Act, 1976, the decree also included the determination of any question under S. 47 which relates to execution of decrees. The Joint Committee of both Houses of Parliament was of the view that this provision of the Code was mainly responsible for the delay in the execution of decrees, and as such it is not included now in the term ‘decree’.

Appealable orders.—The definition of the decree postulates that the term “decree” shall not include any adjudication from which an appeal lies as an appeal from an order. Appealable orders are given in S. 104 and O. XLIII, r. 1, and are discussed in Part VII of the book. Such an adjudication which is appealable as an order is not a decree.

Order of dismissal for default.—The definition of the decree finally lays down that the term “decree” shall not include any order of dismissal for default. Default may be for want of prosecution of the suit or appeal, default of appearance or other defaults. Such orders of dismissal do not fall within the definition of the term “decree”.

Decision on objections to Commissioner’s report.—An appeal against the trial Court’s order rejecting the objections raised in respect of the Commissioner’s report is not maintainable as such order is not an adjudication amounting to a decree, *i. e.*, does not finally determine the rights of the parties. The test of final adjudication is whether the reliefs sought by the parties have been considered and either granted or denied. (*M. Damodaran v. M. Kesavankutty*, A.I.R. 1975 Ker. 16).

Order.—Section 2 (14) of the Code lays down that “Order” means the formal expression of any decision of a civil court which is not a decree.

The following are some of the orders which amount to a decree.

(i) An order rejecting a plaint—the definition of “decree” provides that the rejection of a plaint shall be deemed to be a decree ; (ii) an order dismissing a suit for non-payment of court-fee or for failure to pay additional court-fee demanded (*Dularin v. Hiranman*, 1954 N. L. J. 32) ; (iii) an order for the dismissal of an appeal for non-payment of court-fee demanded after adjudication as to classification of a suit ; (iv) an order discharging some of the defendants for want of cause of action ; (v) an order rejecting prayer for a final decree for foreclosure ; (vi) an order rejecting a plaint for insufficiency of stamp ; (vii) an order discharging defendants for failure of the plaintiffs to furnish particulars, as it amounts either to rejection of a plaint or dismissal of a suit ; (viii) the decision of a district court on appeal that the court below

has no jurisdiction ; (ix) where one issue is settled and the case remanded to the lower court for the determination of another issue ; (x) an order of abatement of a suit ; (xi) an order dismissing an application by a legal representative to be brought on the record ; (xii) an order staying execution of a decree ; and (xiii) an order dismissing cross-objection.

The following are, however, some of the orders which do not amount to a decree :

(i) An order refusing stay ; (ii) remand under S. 151 or an order for amendment under that section ; (iii) an order rejecting an application for leave to sue in *forma pauperis* for no suit has till then been filed ; (iv) an order refusing leave to institute a suit for accounts of a religious endowment ; (v) an order on a petition to appoint a new member on the committee of a religious endowment ; (vi) an order under the Indian Trusts Act dismissing an application for the removal of a trustee ; (vii) an order of an appellate court returning a memorandum of appeal to be presented to the proper court (but an appeal lies from an order returning plaint by the trial court, although no second appeal can be entertained) ; (viii) an order rejecting memorandum of appeal for default in payment of court-fee (*Chotey Lal v. Gotainya*, A. I. R. 1955 V. P., 46) ; (ix) an order of the District Judge setting aside the rejection of a plaint ; (x) an order overruling a plea against the maintainability of a suit ; (xi) decision in plaintiff's favour as to his *locus standi* to sue ; (xii) an order appointing a commissioner to take accounts ; (xiii) an order directing an execution case to be dismissed for non-prosecution ; (xiv) dismissal for non-compliance with an order of the court, if the plaintiff can file a fresh suit (*Mohan Lal v. Banmali*, 1954, N. L. J. 68) ; (xv) an order of the High Court dismissing an appeal for failure on the part of the appellant to deposit printing charges (*Ran Vijay Prasad Singh v. Parmatma Nand Singh*, 1954 A. L. J. 73) ; and (xvi) an interlocutory order in execution deciding a point of law arising incidentally.

Mere right to sue.—Declarations on questions of limitation, jurisdiction, *res judicata* and maintainability of a suit which determine only the plaintiff's right to sue do not fall within the ambit of "decree". For instance, A files a suit against B. B contends that the suit is barred by time. The court frames a preliminary issue on this point and decides that there is no such bar and orders the case to proceed. The decision on issue as to limitation *in favour of the plaintiff* is not a decree inasmuch as it decides merely the plaintiff's right to sue.

Interlocutory Orders.—Interlocutory orders can amount to a decree under S. 2 (2) if they are sufficient to dispose of the suit as a whole, no matter whether they are passed in suits or execution proceedings. An order, however, rejecting the plea of jurisdiction or limitation cannot amount to a decree. The decree, therefore, does not include interlocutory decision on every controversial point, though embodied in a separate order, unless such interlocutory order fulfils the test of S. 2 (2) of the Code. For an interlocutory order which does not finally settle the suit as far as the court making the order is concerned and which cannot at that stage be drawn up in the form of a decree will not be a "formal expression of adjudication". Such an order cannot be also treated as a preliminary decree.

Decree and Order distinguished.—The adjudication of a court of law may be either decrees or orders. The latter are sub-divided into appealable orders and non-appealable orders.

The essence of distinction between a 'decree' and an 'order' seems to be in the nature of the decision, rather than in the manner of expression, for the words 'formal expression' appear in both definitions. The question is one of substance whether an adjudication is a decree or order. (*Ahmed v. Hosain*, 42 I. A. 91). Both decree and order are adjudications of a court of law. The distinction lies between the two in the matter of appeal.

In the first place, every decree is appealable, *i. e.*, a first appeal invariably lies from a decree unless it is expressly provided in the body of the Code or by any other law for the time being in force. For example, it is expressly provided in S. 96 (3) that no appeal shall lie from a decree passed by the court with the consent of parties. But every order is not appealable. Only those orders are appealable which are specified in S. 104 and Order 43, rule 1.

In the second place, a second appeal lies to the High Court in the case of decrees if there is some substantial question of law involved therein. No second appeal lies at all even in the case of appealable orders. [S. 104 (2)].

In the third place, a decree is an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy; an order may or may not finally determine the rights of the parties.

In the fourth place, a decree may be preliminary or final, but there is no such distinction in an order.

In the fifth place, a decree originates from a suit commenced by presentation of a plaint. An order may not necessarily originate from a suit; it generally arises from a proceeding commenced on an application.

Another distinction which existed prior to the enactment of the Code of Civil Procedure (Amendment) Act No. 66 of 1956, was that where the order passed in appeal was reversed or varied, an application for restitution did not lie under S. 144, though the court could order restitution under S. 151, C.P.C. There is, however, one distinction between the exercise of powers under S. 144 and the exercise of the court's inherent jurisdiction under S. 151. While S. 144 is mandatory, the exercise of the power under S. 151 depends upon the discretion of the court which will be used only in the interests of justice. This distinction has now disappeared, as S. 144, as amended by the Amendment Act No. 66 of 1956, includes the variation or reversal of an order along with a decree.

And, lastly, in every suit there is one decree unless in suits for possession and *mesne profits*, administration or pre-emption suits, suits for dissolution of partnership or mortgage suits the Code permits two decrees, one preliminary and the other final; in the case of a proceeding or a suit there is no restriction as to the number of orders that may be passed.

Decree-holder.—The term "decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made. [S. 2 (3)]. It is clear from the above definition that a person who is not a party to the suit but in whose favour an order capable of execution is made is a decree-holder. A person is a decree-holder only as against the judgment-debtors but not as against the defendants discharged before the decree. The term "decree-holder" is not confined to the plaintiff. It denotes

one in whose favour a decree is passed. Thus in a decree for specific performance of an agreement being executable by the plaintiff or the defendant, either party is a "decree-holder."

Foreign court.—"Foreign court" means a court situate outside India and not established or continued by the authority of the Central Government, [S. 2 (5)]. Under the above definition the Privy Council will be a foreign court; and so are other courts in England, Supreme Court of Mauritius, Ceylon courts, etc.

Foreign Judgment.—It means the judgment of a foreign court. [S. 2 (6)]. The decree of a foreign court against a non-resident foreigner is a nullity. A foreign judgment can, however, form a cause of action in India, a discussion of which finds place subsequently.

Judge.—"Judge" means the presiding officer of a civil court. [S. 2 (8)]. A Judge cannot act in a matter if he has a pecuniary interest therein or is in any other way interested or biased.

"Judgment".—Judgment means the statement given by the Judge of the grounds of a decree or order. [S. 2 (9)].

Every judgment other than that of a court of small causes should contain (1) a concise statement of the case; (2) the points for determination; (3) the decision thereon, and (4) the reasons for such decision.

Judgments of a court of small causes need contain only points Nos. 2 and 3.

It was laid down in *Gajraj Singh v. Deohlu* (reported in Summary of cases in 1951 A. L. J. R. July Number) that sketchy orders by judicial officers which are not self-contained and which cannot be appreciated by the appellate or revisional court without an examination of the record are to be regarded as unsatisfactory and are looked upon with disfavour by the High Court.

Difference between 'decree,' 'order' and 'judgment'.—The definitions of a 'decree,' 'order' and 'judgment' in Ss. 2 (2), 2 (14) and 2 (9) respectively of the Code of Civil Procedure make it manifest that both a decree as well as an order are formal expressions of any decision of a civil court. But a decree conclusively determines rights of the parties with regard to all or any of the matters in controversy in a suit and may be either preliminary or final which words do not occur in the definition of the word 'order.' The word 'judgment' may relate both to a decree as well as an order. (*M. Dodla Malliah v. State of Andhra Pradesh*, A. I. R. 1964 Andh. Pra. 216).

"Judgment-debtor".—Judgment-debtor means any person against whom a decree has been passed or an order capable of execution has been made. [S. 2 (10)]. The definition does not include an assignee. A person who has stood surety for costs and against whom a decree for costs has been made is a judgment-debtor.

"Legal representative".—Legal representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. [S. 2 (11)]. The term denotes classes of persons on whom the status of a representative is fastened by reason of the

death of a person whose estate they are held to represent. (*Bisheshar Dayal v. Bajrang Bahadur Singh*, 1929 Oudh, 353).

It is necessary that the legal representative should be in possession of any property of the deceased. All that is necessary is that he should be a person on whom the estate would devolve. The surviving members of a Hindu joint family are not legal representatives, but they may be impleaded as such in cases where the doctrine of survivorship does not apply.

The estate does not mean the whole of the estate. The intermeddlers represent the estate even though they are in possession of parcels of the estate of the deceased and such a 'person who in law represents the estate of a deceased person' must include different legatees under the will. (*Andhra Bank Ltd. v. Srinivasan*, A. I. R. 1962 S. C. 232).

The definition includes an intermeddler. He is not a trespasser, but assumes representative capacity in relation to the estate and not in assertion of a claim of right adversely to the estate. The term "intermeddler" means what is known as an executor *de son tort* and a person would not be an intermeddler unless he has intention to represent the estate. (*Ramprasad v. Jamnadas*, A. I. R. 1952 M. B. 153). He is recognised as legal representative only to award relief against the estate in his hands. A person who purchased property under a collusive transaction during the lifetime of the deceased would not be an intermeddler and cannot be added as legal representative.

The persons or class of persons indicated by the expression "legal representative" would depend on the context. Subject to that qualification it includes properly appointed executors and administrators, heirs-at-law taking by succession or survivorship, reversioners where the action has been brought by or against the widow representing her husband's estate, a universal legatee and in some cases persons in *de facto* possession of the entire estate of the deceased; but it does not include trespassers, creditors who have received payment of the debts due from the estate of the deceased, persons dealing in the ordinary course of business with goods of the deceased received from another, persons who intervene merely for the purposes of preserving the goods of the deceased or providing for his funeral or for immediate necessities of his family, legatees of a part of the estate and those taking possession of the property of the deceased from the legatees of a part of the estate. (*Natesa Sastrigal v. Alamedue Achi*, 1950 M. W. N. 311).

Decree against wrong legal representative.—A true legal representative will be bound by a decree passed against the wrong legal representative if the following conditions are fulfilled, *viz.* —

- (i) the plaintiff decree-holder has acted *bona fide* ;
- (ii) the decree obtained is free from fraud and collusion ;
- (iii) the person wrongly impleaded was impleaded in a representative capacity ;
- (iv) the decree or order was passed against him as representing the estate of the deceased ;
- (v) the plaintiff was ignorant of facts which operate to displace the title of the supposed legal representative ; and

(vi) the person having the real title did not intervene during the pendency of the suit.

Where there are rival claimants the plaintiff or decree-holder may choose the one who appears to have the *prima facie* title.

Mesne profits.—The right to possession is a sacred right guaranteed by all law-abiding citizens. When a person is deprived of his possession he is not only entitled to recover possession but also damages for wrongful possession by another.

The Code defines mesne profits of property as meaning “those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.” [S. 2 (12)].

Wrongful possession of the defendant is the very essence of a claim for mesne profits. There is no occasion for mesne profits if possession is not wrongful. The term “wrongful” means having no right to possession as against the person claiming it. They are awarded to the plaintiff by way of compensation for the period that he was ousted from possession if his suit is decreed. The measure is not what the plaintiff lost. A person in wrongful possession is not liable for failure to realize the highest possible rates of rent and premium, if a fair rent has been realised from the land. [*Secretary of State v. Saroj Kumar*, (1935) 62 I. A. 53].

Liability of sub-tenant.—Where a decree for possession was against two judgment-debtors jointly, one the tenant and the other a sub-tenant of the whole house, the sub-tenant is also liable for mesne profits until delivery of possession and it is not open to him to plead that he had vacated the house earlier. As a joint judgment-debtor he was bound to deliver possession to the decree-holder and not to the co-judgment-debtor. In the case of a joint decree, the judgment-debtors do not have different or definite shares and the liability cannot be apportioned. (*Sannukhan v. Bedaria*, M. B. L. J. 1954 H. C. R. 821).

Principles of Assessment.—A trespasser, whether *bona fide* or *mala fide*, is liable to account for the profits which he makes and which he would have made with ordinary diligence but not for the profits derived by him due to improvement effected by him, e. g., digging a well, etc. On the other hand, the person dispossessed is entitled to compensation for improvements as also for all sums legitimately spent by him in managing the property, although the plaintiff is not bound to pay the defendant compensation for improvements as a condition precedent to obtaining possession. The test for determining mesne profits in such cases is not what the plaintiff has lost by being out of possession, but what the defendant has made or might reasonably or with ordinary prudence have made by his wrongful possession. As stated above, a person in wrongful possession is not liable for failure to realise the highest possible rates of rent, but only a fair rent. So when the person in wrongful possession planted indigo for use in his adjacent factory and it was proved that an ordinary prudent farmer would have grown sugarcane, wheat or tobacco, their Lordships of the Judicial Committee in *Gray v. Bhagumian* [(1930) 57 I. A. 105] assessed mesne profits on the profits of cultivation of these more profitable crops. The true test in calculating mesne profits is what the ordinary prudent agriculturist would have grown on the land from which the plaintiffs have been excluded. The

claim for past years made by the plaintiffs is a circumstance to be taken into account, but is not conclusive. (*Jagannath Prasad v. Dewan Badiul Malk Khan*, A. I. R. 1954 Pat. 447).

Where the land is in the occupation of tenants mesne profits should be awarded not on the basis of produce but on the basis of rent. [*Kamni Kumar Rai v. Krishn Chandra Saha*, 10 I. C. 312]. The principles which ordinarily guide a court in determining the mesne profits are : (i) the wrongful trespasser should not profit by it, (ii) restoration of status before dispossession financially ; and (iii) use to which the decree-holder would have put the land if he was himself in possession. If the property is in the possession of tenants the court may, with the aid of the commissioner, ascertain the gross profits which the tenant did obtain or could reasonably have obtained and deduct therefrom the gross sum for costs of cultivation, the rent paid and the cost of maintenance of the cultivators. The balance left will be mesne profits referred to in S. 2 (12). Mesne profits also include the right to interest on the profits.

The interest and the rate of interest are in the discretion of the court. The burden of proof of actual profits realised is on the person receiving and of profits realisable on the person claiming the same. (*Secretary of State for India in Council v. Sareje Kumar Acharjya Chaudhri*, 62 C. 490, P. C.).

When there is no mention as to the rate of interest that should be allowed on the amount of mesne profits, nor is there any stipulation in the contract bearing on the subject, the rate is in the discretion of the court, but that discretion should proceed on sound principles. The rate of interest depends on a variety of circumstances, but, in the absence of special circumstances which would justify the court to award a higher rate of interest, interest at a uniform rate of 6 per cent. per annum is the reasonable rate of interest which should be allowed for the whole period during which the person entitled to mesne profits was deprived of the use of the money which was due to him. (*Babu Kedar Nath Goenka v. Maharaj Kumar Babu Bageshwari Prasad Singh*, 64 I. A. 240).

To sum up the determination of the amount rests entirely with the discretion of the court and it is difficult to lay down fixed principles which can be applied with precision in every case. The mesne profits being in the nature of damages, the court may mould according to the justice and exigencies of the case.

Burden of Proof.—Having regard to the primary definition of mesne profits in S. 2 (12) as “those profits which the person in wrongful possession of such property actually received,” it was for the person in wrongful possession to supply the data required. Mesne profits are something which a plaintiff cannot evaluate and it is solely for the court to determine them on the evidence before it. (*Tkadiyoor Muri v. Nair Service Society*, 1966 Ker. L. J. 313).

Movable property.—“Movable property” includes growing crops. [S. 2 (13)]. The definition of “movable property” is confined to the Code of Civil Procedure for under the General Clauses Act “standing crops” are immovable property.

Pleader.—“Pleader” means any person entitled to appear and plead for another in court, and includes an advocate, a vakil and an attorney of a High Court [S. 2 (15)]. An advocate of the High Court has the implied authority of his client to settle the suit. The power to compromise a suit is inherent in

the position of an advocate in India. The implied authority of counsel can always be countermanded by the express directions of the client. (*Surendra Nath Mitra v. Tarubala Dasi*, 57 I. A. 123).

Even though a pleader or vakil might not have chosen to get himself enrolled as an Advocate, in their very eligibility to be enrolled as advocates, there is implicit statutory acceptance of the position that all these categories of legal practitioners have substantially the same powers *vis-a-vis* client and Court. The egalitarian ethos injected by the Advocates Act makes for parity of powers between pleaders and advocates to act on behalf of their client. After all, every legal practitioner, labels apart, is an officer of the Court and aids in the cause of justice. Logically and sociologically and indeed legally their responsibility to the clients and to the Court have to be the same even though some of them may be entitled to appear in only District Courts while others in the High Courts, and Advocates in any Court in the whole of the country. The quality of the power—limitations on the Courts in which appearance is permissible being ignored for the time being—cannot stand differentiation. This stand is reinforced by a reference to III, rule 1 and rule 4 (1), C. P. C. which regulate the legal process in Indian Courts.

It is obvious that the definition of 'Pleader' contained in section 2 (15) of the Civil Procedure Code, obliterates any status-wise distinction between an advocate and any other legal practitioner like a vakil or pleader entitled to appear in Court on behalf of his client. A profession whose founding, fighting faith is equal justice under the law does not practise inequality within its fold deaf to the mood-music of non-discrimination. Lawyers, be they advocates, vakils or pleaders stand on the same footing in regard to their power to act on behalf of their clients.

His powers : (1) *Abandoning an issue*.—A pleader has authority to do all acts incidental to that general authority, but such act must be *bona fide* and not against the express instructions of the client. He may abandon an issue or plea, but cannot give up a portion of the claim without express instructions. (*Ghasiram Goenka v. Haribux Goberdhandas*, 1930 C. 477).

(2) *Admission*.—His admission of fact during the actual progress of litigation binds the client unless made under mistake or misapprehension, or unless it is against the instructions of his client, or beyond the scope of the suit. An erroneous admission on a point of law is, however, not binding at all.

(3) *Compromise*.—A pleader has no implied authority to compromise; he should have special *vakalatnama* to enter into any particular compromise. A counsel, an advocate, an attorney or solicitor (not pleader) has, however, such implied authority to enter into a compromise, (*Sourindra Nath Mitra v. Heramba Nath Bandopadhyaya*, 1923 P. C. 98). But the compromise should not be against the client's express instructions. (*Taru Bala Dasi v. Sourendra Nath Mitra*, 41 C. L. J. 213).

(4) *Reference to arbitration*.—A pleader may refer the suit to arbitration without any special authority. The authority does not extend to matters different from those which the client has authorised.

(5) *Delegation*.—A pleader can delegate to another pleader his power to plead, not the power to act on behalf of his client.

Public Officer.—There cannot be any doubt that the Custodian of Evacuee Property performs public duty under the Administration of Evacuee Property Act and that he is in the service and pay of the Government. He is thus a 'Public Officer' within the meaning of that term as defined in S. 2 (17) (h), C. P. C. Hence before a suit could be instituted against the Custodian challenging the acts done by him in his official capacity, notice under S. 80, C. P. C. must necessarily be given. (*Ramcharan Mahto v. Custodian of Evacuee Property Bihar*, A. I. R. 1964 Pat. 275).

Where the officers of a corporation (the capital whereof was provided by the Central Government or its working was supervised or directions were issued by the Central Government) are in service and pay of the corporation and are paid out of the funds of the corporation, they are not 'public officers' within the meaning of Ss. 2 (17) (h) and S. 80 of the Code of Civil Procedure. (*Kamta Prasad Singh v. The Regional Manager, Food Corporation of India*, A. I. R. 1974, Patna, 376).

3. Subordination of Courts.—For the purposes of this Code, the district court is subordinate to the High Court, and every civil court of a grade inferior to that of a district court and every court of small causes is subordinate to the High Court and district court.

The list of subordinate courts mentioned here is not exhaustive.

A Tribunal exercising powers under the Displaced Persons Debts Adjustments Act, 70 of 1951, is neither a district court nor a civil court nor a court of small causes. Consequently, such a Tribunal is not a court subordinate to the High Court for the purposes of the Code of Civil Procedure. The only courts which are subordinate to the High Court for the purposes of the Code of Civil Procedure are those enumerated in S. 3 of the Code of Civil Procedure and may be such other courts as may have been made subordinate to the High Court for the purposes of the Code of Civil Procedure by any other enactment. (*Sundar Das v. Lachman Das*, 1957 A. L. J. 292).

4. Savings.—(1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land.

Section 4 does not bar the applicability of the Code where special or local law is silent.

5. Application of the Code to Revenue Courts.—(1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent, the State Government may, by notification in the official Gazette, declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those courts, or shall only apply to them with such modifications as the State Government may prescribe.

(2) "Revenue Court" in sub-section (1) means a court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes ; but does not include a civil court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature.

6. Pecuniary Jurisdiction.—Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

The subject-matter of a suit is not the property in respect of which the plaintiff claims relief but the relief itself.

Where the suit was within the jurisdiction of the court though the decree exceeded its pecuniary jurisdiction the transferee court can execute the decree. (*Hiralal v. Ratanlal*, 1954 N. L. 241).

7. Provincial Small Cause Courts.—The following provisions shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905, or to Courts exercising the jurisdiction of a Court of Small Causes under the said Act or law, or to Courts in any part of India to which the said Act does not extend exercising a corresponding jurisdiction, that is to say,—

(a) so much of the body of the Code as relates to—

- (i) suits excepted from the cognizance of a Court of Small Causes ;
- (ii) the execution of decrees in such suits ;
- (iii) the execution of decrees against immovable property ; and

(b) the following sections, that is to say,—
S. 9,

Ss. 91 and 92,

Ss. 94 and 95 so far as they authorise or relate to—

- (i) orders for the attachment of immovable property,
- (ii) injunctions,
- (iii) the appointment of a receiver of immovable property, or
- (iv) the interlocutory orders referred to in clause (e) of S. 94 and

Ss. 96 to 112 and 115.

8. Presidency Small Cause Courts.—Save as provided in Ss. 24, 38 to 41, 75, clauses (a), (b) and (c), 76, 77, 157 and 158, and by the Presidency Small Cause Courts Act, 1882, the provisions in the body of this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay :

Provided that—

(1) the High Courts of Judicature at Fort William, Madras and Bombay, as the case may be, may, from time to time, by notification in the Official Gazette, direct that any such provision not inconsistent with the express provisions of the Presidency Small Cause Courts Act, 1882, and with such modifications and adaptations as may be specified in the notification, shall extend to suits or proceedings or any class of suits or proceedings in such Court ;

(2) all rules heretofore made by any of the said High Courts under S. 9 of the Presidency Small Cause Courts Act, 1882, shall be deemed to have been validly made.

PART I
SUITS IN GENERAL
[Ss. 9—35-A and S. 44-A]

Jurisdiction of the Courts and Res Judicata
[Ss. 9—14 and S. 44-A]

Jurisdiction in General.—Jurisdiction in a wide sense means the extent of the power of the court to entertain suits, appeals and applications. In its technical sense jurisdiction means the extent of the authority of a court to administer justice not only with reference to the subject-matter of the suit but also to the local and pecuniary limits of its jurisdiction. In other words, it is the legal authority to administer justice according to the means which the law has provided, and subject to the limitations imposed by that law upon the judicial authority. It is thus the power to hear and determine a cause and adjudicate, or exercise any judicial function in relation to it. If the court has no jurisdiction, consent of the parties or their inaction, cannot confer that jurisdiction ; nor by consent jurisdiction can be ousted.

From the above it is clear that the law places certain limitations upon the exercise of jurisdiction by the courts. The limitations may relate to jurisdiction over the subject-matter of the suit, pecuniary jurisdiction or local or territorial jurisdiction.

The meaning of the word “jurisdiction” has been expounded with some detail in a Full Bench case in *Hriday Nath Roy v. Ram Chandra* (A. I. R. 1921 Cal. 34). The following passage from the judgment of the said case is relevant in this connection :

“In the order of reference to a Full Bench in the case of *Sukhlal v. Tara Chand* [(2) (1905) 33 Cal. 68], it was stated that jurisdiction may be defined to be the power of Court to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it ; in other words, by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. An examination of the cases in the books discloses numerous attempts to define the term “jurisdiction”, which has been stated to be ‘the power to hear and determine issues of law and fact’ ; ‘the authority by which the Judicial Officers take cognizance of and decide causes’, ‘the authority to hear and decide a legal controversy’, ‘the power to hear and determine the subject-matter in controversy between parties to a suit and to adjudicate or exercise any judicial power over them’ ; ‘the power to hear, determine and pronounce judgment on the issues before the Court’ ; ‘the power or authority which is conferred upon a Court by the Legislature to hear and determine causes between parties and to carry the judgments into the facts, to apply the law, to pronounce the judgment and to carry it into execution.”

Jurisdiction can, as stated above, be classified into three categories, viz. (1) jurisdiction over the subject-matter ; (2) territorial jurisdiction ; and (3) pecuniary jurisdiction.

1. **Jurisdiction over the subject-matter.**—Certain courts are precluded from entertaining suits of particular classes by statute. Thus a small cause court can try only such suits as a suit for money due on account of an oral loan or under a bond or promissory note, a suit for price of work done, etc., but it has no jurisdiction to try suits for specific performance of contracts, for dissolution of partnership, for an injunction, suits relating to immovable property, or for defamation.

2. **Local or Territorial Jurisdiction.**—Every court has its own limits, fixed by the Government, beyond which it cannot exercise its jurisdiction. Thus the District Judge is in charge of the district and cannot exercise his powers beyond that district. The Munsif West and the Munsif East are in charge of the areas assigned to them. The High Court has jurisdiction over the whole territory of the State within which it is situate.

3. **Pecuniary Jurisdiction.**—Throughout India there are a large number of civil courts of different grades having jurisdiction to try suits or hear appeals of different amounts or value. Some of these courts have unlimited pecuniary jurisdiction. Thus the High Court and the Courts of the District Judge and the Civil Judge have unlimited pecuniary jurisdiction. Other courts have only a limited pecuniary jurisdiction. A Munsif in the Uttar Pradesh has, after completion of a certain period of service, pecuniary jurisdiction to try suits, in which the value of the subject-matter does not exceed Rs. 5,000. Under S. 15 (2) of the Provincial Small Causes Courts, Act, 1887, a Small Cause Court Judge has pecuniary jurisdiction up to Rs. 500 only.

The jurisdiction of a court may again be *Original* or *Appellate*. In the exercise of its original jurisdiction a court entertains original suits, while in the exercise of its appellate jurisdiction it entertains appeals. The Munsif's court and the Court of Small Causes have only original jurisdiction; the District Judge's court and the various High Courts have both original and appellate jurisdiction. The High Court of Allahabad has limited original jurisdiction. In the first place, it has original jurisdiction with regard to matrimonial, testamentary, probate and company matters. And, in the second place, it can exercise extraordinary jurisdiction in any suit or trial, as it has the power to remove a suit from a subordinate court to itself for trial and determination.

9. Courts to try all civil suits unless barred.—The courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Explanation I.—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

Explanation II.—For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.

The question that falls for determination is : what is a suit of a civil nature ? A suit is of a civil nature if the principal question in the suit relates

to the determination of a civil right. Thus if the principal question in the suit is a caste question or a question relating to religious rites or ceremonies, the suit is not of a civil nature. In order to fall within the purview of the term "of a civil nature" the suit must be for the enforcement of rights and obligations of a citizen and not matters which are purely social. The rights vesting in a person by virtue of being a member of a caste or religious community would not be of a civil nature and the cognizance of the court would be barred to try a suit of such a nature. But Explanation I to S. 9 shows that where a question relating to religious rites or ceremonies is not the principal question in the suit and is only a subsidiary question and that the principal question is of a civil nature, *viz.*, a right to property or to an office, the court has the power to determine the question relating to religious rites or ceremonies to enable it to decide the principal question which is of a civil nature. A suit which is thus otherwise of a civil nature is not altered because questions relating to religious rites or ceremonies arise incidentally. As said above, a suit in which the principal question relates to religious rites or ceremonies is not a suit of a civil nature. But where there has been a violation of a legal right that violation affords a cause of action to the plaintiff and it is immaterial whether he has suffered any pecuniary damage or not. Explanation II, added by the Amendment Act, 1976, further provides that it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.

Caste question.—A caste question is a question which relates to matters affecting the internal autonomy of the caste and its social relations. Purely caste questions cannot form the subject-matter of a civil suit. The exclusion of a member of a caste from invitation to caste dinners or ceremonies deprives him only of a social privilege and cannot be the basis of a suit of a civil nature for dinner is not a legal but social obligation and is, therefore, not recoverable by means of a suit. Temporary exclusion of some members of a caste from social intercourse with other families on account of infringement of caste rules at the instance of the *panchayat* is not a matter for consideration for the civil court. So also right to assistance in removal of a dead body, contribution of funds on marriage occasions, and breaches of an agreement to inter-marry between members of different sub-castes are not questions of a civil nature and are accordingly not enforceable. But where the right of membership and personal character and status of an individual are affected the suit is maintainable as a suit of a civil nature. It falls within the jurisdiction of the civil courts to deal with a caste question where the character of a member has been unjustly injured. Thus expulsion of a member from the caste involves the determination of a legal right and a suit will lie to determine the validity of the expulsion. (*Raghunath Damodhar v. Janardhan Gopal*, 15 Bom. 599). The right to remain in the community or to exercise the rights and privileges of the members of the community is a civil one. (*Momsoor Ali v. Faiyabali Mohammad Ali Dawoodi Bohra*, 157 I.C. 302). So will also a suit lie for damages for wrongful expulsion. Similarly a right to inspect accounts of caste property held in trust is enforceable by means of a suit.

A suit by a member of a caste for inspection of accounts and other documents relating to the management of the caste property does not involve a caste question and is maintainable. However a suit for rendition of accounts of the management of the caste property is different from a suit for mere inspection of accounts and the enforcement of a right sought to be asserted in a suit

of the former type will interfere with the autonomy of the caste. (*Kanji v. Bhika*, 6, Sau. L. R. 380).

Right to religious honour.—A suit does not lie for mere honour or dignity unconnected with fees, profits or emoluments. (*Sunkur Bharti Swami v. Sidha Lingayah Charanti*, 3 M. I. A. 198). A suit for declaration and injunction in respect of a right to be carried in a palanquin on certain days through public street is not maintainable. Courts will not decide disputes as to precedence or privilege between purely religious functionaries. (*Niranjana Jagadguru Andaniswami v. Totaswami Guru*, 45 Bom. 590). But civil courts have jurisdiction to entertain a suit for honours if they are claimed as attached inseparably to an office. (*Rungachariar v. Rungasami Bhattachar*, 32 Mad. 291). The right to celebrate the annual festival in a temple is a civil right.

Right to honours unconnected with an office cannot form the subject-matter of a suit. [*Thiruvengada Ramanuja Jeer v. Perarulala Ramanuja Jeer*, (1953) 1 M. L. J. 37].

The plaintiffs sued for declaration of the right to receive *prasadam* when the image was taken out in procession at a particular festival. It was held that the right claimed was a mere dignity attached to any office and, therefore, was not a right of a civil nature and the suit did not lie. (*Shivagnanam Pilai Shamugham v. T. M. Chidambarathanu Mudaliar*, I.L.R. 1954 T.C. 138).

✓ **Right to worship.**—A suit to establish the right to worship in a temple according to the worshipper's belief is a suit of a civil nature. (*Waman Balwan Kashikar v. Balu Harshet Shete*, 44 Bom. 410). A suit to establish a person's right to enter a religious place and a suit to restrain the defendant from entering a place of worship are both entertainable, being suits of a civil nature. It is a civil right of every citizen that he should be entitled to carry on his worship in any method he likes so long as he does not, by his performances, affect others injuriously. Where the plaintiffs claimed to be entitled to enter the temple bareheaded and worship, it was held that the civil court had jurisdiction to entertain it. (*Ratan Singh v. Bali Ram*, A. I. R. 1952 Punjab 163). A right to take part in public worship either in a temple or of a deity while it is being taken out in procession is a civil right, cognizable, by a civil court. (*Managobinda Panda v. Paramahansa Paribrajakacharja*, A. I. R. 1953 Orissa 151).

✓ **Right to take out procession.**—The right to take out a procession through the public streets is a civil right, and a suit will lie to enforce such a right in a civil court. But the carrying of any emblem in a procession along the streets is not the taking out of a religious procession and a suit to enforce a right to carry it is barred under S. 9 C. P. C. [*Sanganbasaswami Guru v. Baburao Ganesh Kulkarni*, I. L. R. (1946) Bom. 437]. A claim to an exclusive right to hold the lighted torch inside the chariot during the festival in a temple does not amount to an office which could be enforced in a court within the explanation to S. 9, C. P. C., as there is no corresponding compellable duty. (*Kannaganti Suryanarayanamurthi v. Piduga Rama Roy*, A.I.R. 1953 Mad. 710).

✓ **Other rights of a civil nature.**—A suit to declare the election of a candidate as contrary to law is a suit of a civil nature. So also a suit for declaration of the validity of election as municipal commissioner is one of a civil nature cognisable by the civil courts. A suit to set aside an award is also maintainable.

✓ **Right to share in offerings.**—Right to share in temple offerings is a civil right. A suit by a priest to recover fees received by an unauthorised person is a suit of a civil nature cognisable by a civil court. It is settled law that if a person usurps an office to which another person is entitled and receives the fees of the office, he is bound to account to the rightful owner for them, and the rightful owner may sue the usurper to recover the fees properly payable to him. This is, however, not the case where payments are merely voluntary, and a suit does not lie to recover voluntary gratuities that may have been received by the usurper. (*Sitaram Bhat v. Sitaram Ganesh*, (1869) 6 B. H. C. 250]. But a claim to officiate as the priest of the deity in a particular temple on the occasion of certain festivals for which the remuneration was payable by the temple is an office of a civil nature within S. 9, C. P. C. (*Ramchandra Tripathy v. Maguni Tripathy*, A. I. R. 1951 Ori. 64).

Suit in respect of voluntary offerings.—A suit in respect of voluntary offerings, *i. e.*, for recovery of emoluments received by the defendants for officiating as *purohits* at marriage and other ceremonies conducted by them in the houses of Vysyas of a place on the ground that the right to officiate as *purohit* exclusively belonged to the plaintiff is not maintainable. (*In re. Venkatrao*, A. I. R. 1954 Mad. 346).

✓ **Right to religious office.**—There can be no office without duties attached to it. The right to hold a certain office in a certain place at a certain season of the year confers a legal character. A hereditary priest however, cannot compel his *yajman* to accept his service. Right to office of a hereditary priest to which fees are attached is property and a suit is maintainable.

There has, however, been a conflict of decisions between the various High Courts on the question as to whether a suit will lie at the instance of the holder of a religious office for disturbing him in the exercise of his office, which may be discussed as under :

Religious office may be divided into two classes : (1) where fees are appurtenant as of right and (2) where no fees are attached but the holder may receive such gratuities as may be paid to him, *viz.*, the office of a *pujari*. As regards the religious offices where fees are appurtenant as of right, there is no dispute that a suit will lie against an intruder for a declaration that the office is vested in the plaintiff. But as regards religious offices where no fees are attached, there is a divergence of opinion in the decisions of the different High Courts. According to the Calcutta High Court it is a suit of a civil nature cognisable by a civil court on the analogy of the definition of "office" in the Explanation to S. 9 of the Code. According to the Madras High Court a suit does not lie for a religious office to which no fees are attached, as, in their opinion, such a religious office where no fees are attached is not an "office" within the meaning of the section. According to the High Courts of Allahabad and Patna, a right to perform a religious office to which no emoluments are attached cannot be enforced by a civil suit. The Bombay High Court is of the view that a suit lies for a religious office which is attached to a place though no fees are appurtenant to it, *e. g.*, the office of an officiating priest in a temple, but not where the office is personal in character, *e. g.*, office of a *guru*.

The right to officiate as a priest or as a *guru simpliciter* is not a civil right and no suit lies to enforce the same. But where it amounts to an office

attached to an institution such as a temple, it has been recognised as a civil right. The fact that there are emoluments of a non-gratuitous character payable out of the funds of the institution is relevant though the absence thereof is not decisive. There may be offices without emoluments at all. The crucial test in determining whether a claim to *purohitship* or priesthood of a temple is a claim to an office or not is whether there are duties attached to the *purohitship* which are enforceable by law, custom or usage, whether by deprivation or other temporal sanction. (*Chunna Dutt Vyas v. Babu Nandan*, 32 All. 52).

Right to officiate as purohit and guru.—A claim to officiate as the priest of the deity in a particular temple on the occasion of certain festivals for which the remuneration was payable by the temple is an office of a civil nature within S. 9, C. P. C. But a claim to be declared the *guru* of the *archakas* of a temple is not a claim to an office of a civil nature. (*Ramchandra Tripathi v. Maguni Tripathi*, A. I. R. 1951 Ori. 64).

Right to secular office.—Where the plaintiff's services are honorary and gratuitous and there is no question of any contract, a civil court has no jurisdiction. (*Maharaj Varain Sheopuri v. Shashi Shekhawar Roy*, 37 A. 313). A suit by an honorary lecturer to compel delivery of lectures by him is not maintainable, for there is no injury to the personal right of the lecturer on account of no arrangements having been made by the university for the delivery of lectures. A suit will also not lie at the instance of a dismissed honorary secretary of an association which has the power to alter the rules at any moment. A suit, however, by one director against the other directors of a limited company to restrain the latter from preventing him from acting as such is maintainable.

Company.—If a company terminates the appointment of the managing agents by an ordinary resolution contrary to the articles of association, the matter is not one merely concerning the internal management of the company and the civil court can grant a declaration to the effect that the resolution is invalid. [*Ram Kissendas v. Satya Charan*, A. I. R. 1950 (P. C.) 81]. Similarly where the managing agents of a public utility company (limited) dismiss certain clerks without the consent of the Board of Directors, a suit by the latter for a declaration that the powers of the managing agents to dismiss clerks were subject to the control of the Board of Directors and that the dismissal was illegal and improper is a suit of a civil nature cognisable by the civil courts. (*Nawabshah Electric Supply Co. Ltd. v. Hariram S. Ahuja*, A. I. R. 1947 Sind, 31]. But a suit by a railway guard not selected by the selection board for promotion from grade II to grade III for a declaration that he is entitled to all the privileges, rights and emoluments of grade III, inasmuch as the act of the railway department in not appointing him to the rank of grade III is against law and departmental rules and *ultra vires* is not maintainable. It is not for the courts to make appointments and when promotions are made by superior officers by selection on seniority or fitness or on both it is open to the plaintiff to appeal to the authorities higher than the selection boards, if there is any. [5 D. L. R. (Simla) 214].

Executive authority. The civil court has power to entertain a suit in which the question is whether the executive authority has acted *ultra vires*. (*Ramautar Lal v. Emperor*, A. I. R. 1948 P. C. 32).

Brit Jijmani right.—*Brit Jijmani* right is a heritable property and is in some cases transferable. An action by a legal heir of a *Panda* for

declaration of his right to inheritance and for an injunction restraining the defendants from interfering with the plaintiff's rights and for recovery of possession of the pilgrim's *bahis*, is one of a civil nature and maintainable in the civil court. [*Mt. Sardar Kunwar v. Gajanand*, 1942 A. W. R. (H. C.) 185].

The right of *yajman vritti* is not in the nature of an easement. Both *yajman vritti* and *man vritti* are offerings to a *purohit* by a devout Hindu on the occasion of his officiating at religious ceremonies and functions. A *man vritti*, however, differs in this respect that the relation between a *yajman* and *purohit* is casual or temporary. There is no fixity of character and in consequence it is not a heritable asset. But *yajman vritti* creates a permanent relation, which is regarded as a heritable property. The right of *yajman vritti* being a right in property is heritable and in consequence is also devisable. The right being property on the death of the parties to an agreement to divide the income, the agreement does not come to an end. Therefore a suit for declaration of a right to share the income derived from the *yajman vritti* is of a civil nature and is maintainable. (*Ghisibai v. Mangilal*, A. I. R. 1953 M. B., 7).

✓ Suit expressly or impliedly barred.—The jurisdiction of civil courts is expressly barred when there is some enactment or rule of law precluding them from taking cognizance of a suit. They are suits barred by the Guardians and Wards Act, awards under the Co-operative Societies Act, etc.

✓ Suits barred on grounds of public policy.—They are suits the cognizance of which is impliedly barred on the grounds of public or State policy. Suits by a witness to recover money agreed to be paid to him in consideration of his giving evidence, suits on agreements void on grounds of public policy, e. g., rent of lodgings knowingly let to a prostitute, suits to enforce an agreement to suppress a criminal prosecution, suits based on illegal or unlawful contracts, etc., are not maintainable. So is also a suit for damages against a judicial officer for acts done in good faith and in discharge of his official duty not maintainable unless he acts illegally and without due care and caution.

Suit for restitution of conjugal rights by a Christian.—Where the partners are Christians, a decree for restitution of conjugal rights can be granted under the provisions of a special statute, viz. the Indian Divorce Act, 1869, governing the procedure by the District Court or the High Court on the petition of the husband or wife. The general remedy of a suit in the ordinary civil courts as provided by S. 9, C. P. C., is impliedly barred by the Indian Divorce Act.

Suits by Hindu wife for perpetual injunction restraining her husband from contracting second marriage.—A suit brought by a Hindu wife for an injunction perpetually restraining her Hindu husband from contracting a second marriage falls within S. 9, C. P. C., and is cognisable by a civil court. It is plain that the suit is of a civil nature. Its cognizance is not expressly or impliedly barred by any provisions in the Hindu Marriage Act. The suit is clearly permitted by S. 54 (new S. 38), Specific Relief Act. The plaintiff when she seeks the injunction in her suit is seeking the prevention of the breach of an obligation created by S. 5 (i), Hindu Marriage Act, in her favour and, therefore, entitled to seek that injunction under S. 54 (new S. 38), Specific Relief Act. The expression 'obligation' occurring in the first paragraph of

S. 54 (new S. 38), Specific Relief Act, has wide import and it is not necessary that it should be an obligation arising out of contract. (*Shankarappa v. Basamma*, A. I. R. 1964 Mys. 247).

✓ **Jurisdiction of a Court.**—The jurisdiction of a court to entertain a suit is to be determined by the allegations made in the plaint and not by the result of the suit. (*Debi Sahai v. Ganga Sahai*, 1954 A. L. J. 341).

✓ **Jurisdiction of a quasi-judicial tribunal.**—Jurisdiction means authority to decide. Whenever a judicial or quasi-judicial tribunal is empowered or required to enquire into a question of law or fact for the purpose of giving a decision on it, its findings thereon cannot be impeached collaterally or on an application for certiorari but are binding until reversed on appeal. Where a quasi-judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion, whether it is wrong in law or in fact. The question whether a tribunal has jurisdiction depends not on the truth or falsehood of the facts into which it has to enquire, or upon the correctness of its findings on these facts, but upon their nature, and it is determinable “at the commencement, not at the conclusion, of the inquiry.” [*Rex v. Boltan*, (1841) 1 Q. B. 66, 74].

A tribunal may lack jurisdiction if it is improperly constituted, or if it fails to observe certain essential preliminaries to the inquiry. But it does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question that it is empowered or required (*i. e.*, has jurisdiction) to determine. The strength of this theory of jurisdiction lies in its logical consistency. The characteristic attribute of a judicial act or decision is that it binds, whether it be right or wrong. An error of law or fact committed by a judicial or quasi-judicial body cannot, in general, be impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends. These principles govern not only the findings of inferior courts *stricto sensu* but also the findings of administrative bodies which are held to be acting in a judicial capacity. Such bodies are deemed to have been invested with power to err within the limits of their jurisdiction; and provided that they keep within those limits, their decisions must be accepted as valid unless set aside on appeal. Even the doctrine of *res judicata* has been applied to such decisions. (Per S. K. Das, J. in *Ujjam Bai v. State of Uttar Pradesh*, A. I. R. 1962 S.C. 1621).

✓ **Jurisdiction of civil court.**—Where the right claimed is not purely a creature of a statute, but is a common law right and the statute entrusting the special tribunal with certain disputes relating to the right does not expressly oust the jurisdiction of the civil court wholly and the language of the statute does not in unmistakable terms make out that the right must only be exercised or enforced in a manner provided by the statute, the jurisdiction will not be barred. Also, where the statute does not provide any special machinery for the determination of any particular right recognised or provided by the statute, recourse to the civil court for the assertion and determination of the right should be, and, therefore, would be available. It is a general principle of law that where there is a right there must be a remedy; *ubi jus ibi remedium*. Of course, where a right is created by statute and a special tribunal or forum is provided for its assertion and enforcement the ordinary civil court would have no jurisdiction to entertain disputes relating to the determination and enforcement of the right in question. As in every case where the question of the exclusion of the civil court's jurisdiction is pleaded, the matter has to be

considered in the light of the words used in the statutory provision on which the exclusion is rested. [*Port of Madras v. Bombay Co. (P.) Ltd. Madras, A.I.R. 1967 Mad. 318*].

RES SUB-JUDICE

Section 10 of the Code of Civil Procedure provides the rule with regard to stay of suits where things are under consideration or pending adjudication by a court. That section reads :

10. Stay of Suit.—No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

Explanation.—The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action.

Section 10 requires that a suit must be stayed if the matter directly and substantially in issue in it is also directly and substantially in issue in a previous suit that is pending. The criterion for deciding whether the subsequent suit be stayed or not is whether there is identity of the matters directly and substantially in issue in the two suits ; if there is, the subsequent suit must be stayed and if there is not, it will not be stayed. (*Nem Kumar Agarwal v. Nem Kumar, 1957 A. L. J. 734*).

The object of this section is to prevent two courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. It is to obviate conflict of decisions of two contradictory decrees being passed in respect of the same subject-matter between the same parties that the present section has been enacted.

Conditions for the applicability of S. 10.—In order to attract the application of this section it is necessary that the following conditions must be fulfilled :

- (1) A previously instituted suit is pending in a court ;
- (2) The matter in issue in the second suit is also directly and substantially in issue in a previously instituted suit ;
- (3) The previously instituted suit must be pending in the same court in which the subsequent suit is brought, or in any other court in India or in any court beyond the limits of India established or continued by the Central Government or in the Supreme Court ;
- (4) The court in which the previous suit is pending has jurisdiction to grant the relief claimed in the subsequent suit ;

(5) The parties in the two suits are the same ; and

(6) The parties must be litigating under the same title in both the suits.

To sum up, the conditions for the application of S. 10 are : (1) The matter in issue in the second suit must also be directly and substantially in issue in the prior suit ; (2) the prior suit must be pending in the same court or in any court in India having jurisdiction to grant the relief claimed ; and (3) where the previously instituted suit is pending in any court in India, etc., such court is of competent jurisdiction to grant the relief claimed in the subsequent suit. [*Judgmetal Trg. Republike v. Rungta & Sons (P.) Ltd.*, A. I. R. 1966 Cal. 382].

It may, however, also be noted that the terms "suit" in this section includes appeal.

The words of S. 10 are mandatory and the test to determine whether the matter in issue in the second suit is also directly and substantially in issue in the previously instituted suit is whether if the first suit is determined the matters raised in the second suit will be *res judicata* by reason of the decision in the prior suit. It is not necessary that the subject-matter and cause of action should be the same. But what is essential is that there must be substantial identity between the matter in dispute and parties in the earlier and later suits. (*Kunthi Sankara Ejaman v. Vankappa Bhatta*, A. I. R. 1954 Mad. 820).

Matter in issue.—All the issues in the second suit must be determined by the decision in the first suit before S. 10 can come into operation. The words "matter in issue" in S. 10, C. P. C., mean the entire matter in controversy and not one of several issues in the case. Where the earlier suit was for recovery of rent for a certain period and the subsequent suit is for recovery of rent for the subsequent years and for ejectment, the matter in issue in the two suits would not be deemed to be the same and S. 10, C. P. C., would not be applicable. (*Sri Bhola Prasad v. Srimati Jagpata*, 1954 A. L. J. 696).

The second suit, it must be noted, is not dismissed as barred, it is only the trial of the suit that is not proceeded with and is stayed. The section is no bar to the institution of a second suit. In many cases it is necessary for a party even to institute a second suit in order to save the period of limitation.

One of the most essential conditions of S. 10 is that the matter in issue in the later suit which is sought to be stayed must be directly and substantially in issue in the earlier suit which is pending in the same or in any other court of concurrent jurisdiction. A mere identity of some of the issues in both the suits is not sufficient to attract this section. Unless the decision of the suit operates as *res judicata* in the other suit it cannot be said that the matter in issue is "directly and substantially" the same in both the suits. In other words, the decision in one suit must non-suit the other suit before it can be said that the matter in issue in both the suits is directly and substantially the same. (*Siba Prasad Jash v. Kali Prasad Kundu*, A. I. R. 1975 Calcutta, 410).

Effect of contravention.—A decree passed, in contravention of S. 10 is not a nullity and cannot be disregarded in execution proceedings. (*Sheopat Rai v. Warak Chand*, 46 I. C. 419).

In a case not covered by S. 80 an order for stay may be made under S. 151, C. P. C., if the court considers that it is necessary in the interest of justice and in order to avoid unnecessary harassment to any of the parties.

RES JUDICATA

Object.—The doctrine of *res judicata* is based upon two Roman maxims *Nemo debet bis vexari pro uno eadem causa*, i. e., no one shall be vexed twice over for the same cause of action, and *Interest republicae ut sit finis litium*, i. e., it is to the interest of the State that there should be an end to litigation. The first maxim looks to the interest of the litigant, who should be protected from a vexatious multiplicity of suits, for otherwise a man possessed of wealth and capacity to fight may overawe his adversary by constant dread to litigation. The second maxim is based on the ground of public policy that there should be an end to litigation. Judicial decisions must be accepted as correct, for otherwise if suits were allowed to be filed endlessly for the same cause of action, it will be impossible for the existing courts to deal with the ever-growing number of suits. Unlimited or perpetual litigation disturbs the peace of the society and leads to disorder and confusion. It is a rule common to all civilised systems of jurisprudence, and was well understood by Hindu lawyers as well as Mohamedan jurists and is one well known to Roman jurisprudence as well as other modern systems of law.

Indian Origin of Res Judicata.—The principle of *res judicata* (matter already decided) is founded on the ancient principle of *prang-nyaya* (previous judgment). The doctrine which is called by its Latin name of *res judicata* and which prevents a party from re-agitating a dispute which has already been decided between the parties was evolved and developed by the jurists of ancient India under the title of *prang-nyaya* (previous decision). The principle is thus enunciated in Brihaspati Smriti :

“If a person who has been defeated in a suit according to law (*acharena avasanoopi*) files his plaint once again he must be told that he has been defeated already ; this is called the plea of *prang-nyaya*.”

But the plea had to be raised expressly by the defendant. In Harita Dharma Shastra it is provided that the onus is on the defendant to plead and establish the bar of *prang-nyaya*. As late as the 16th century A. D. Vachaspati Misra, the author of Vyovahara-Chintamani, the great code on legal procedure, wrote that the burden of establishing the bar of *prang-nyaya* was on the defendant because it was his duty to prove his former victory.—Vyovahara Chintamani, edited by Dr. Ludo Rocher, published by the University of Ghent, 1956, p. 64 (cited by Mr. Justice Dhavan of the Allahabad High Court.)

Res judicata connotes a thing already adjudicated upon—*res* means a thing and *judicata* means already decided.

The rule of *res judicata* as enunciated in S. 11 of the Code of Civil Procedure reads thus :

11. Res Judicata.—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which issue has been

subsequently raised, and has been heard and finally decided by such Court.

Explanation I.—The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such court.

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Constructive Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.—Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.—The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that proceeding.

Explanation VIII.—An issue heard and finally decided by a court of limited jurisdiction, competent to decide such issue, shall operate as *res judicata* in a subsequent suit, notwithstanding that such court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.

Res Judicata and Res Sub-Judice.—The rule of *res judicata* in S. 11 is clearly distinguishable from the rule of *res sub-judice* explained in S. 10. (The former relates to a matter already adjudicated upon, *i. e.*, a matter on which judgment has been pronounced,) while the latter relates to a matter which is pending judicial enquiry. The rule in S. 10 bars the trial of a suit in which the matter directly and substantially in issue is pending judicial decision in a previously

instituted suit by staying the trial of the latter suit ; S. 11 bars altogether the trial of a suit or an issue in which the matter directly and substantially in issue has already been adjudicated upon in a previous suit.

Essentials of Res Judicata.—The essentials for the applicability of the doctrine of *res judicata* have been well summarised by Sir William DeGray in the leading case of the *Duchess of Kingstone* (2 Smith's Leading Cases, 11th Edition, p. 731) in the following passage :

“From the variety of cases relative to judgment being given in evidence in civil suits these two deductions seem to follow as generally true : first that a judgment of a court of concurrent jurisdiction, directly speaking on the point, is, as a plea, a bar, or as evidence, conclusive, between the same parties upon the same matter, directly in question in another court ; secondly, that the judgment of a court of exclusive jurisdiction, directly on the point, is, in like manner, conclusive upon the same matter, between same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a court of concurrent or exclusive jurisdiction is evidence of any matter which came *collaterally* in question, though within their jurisdiction, nor of any matter incidentally cognisable nor of any matter to be inferred by argument from the judgment.”

Chitaley quoting the above observations with approval remarks that thus it is clear that it is essential that the former judgment must be :—

- ✓(1) that of a court of competent jurisdiction ;
 - ✓(2) *directly speaking upon* the matter in question in the subsequent suit ,
and
 - ✓(3) between the same parties.
- ✓Otherwise even the general principle of *res judicata* will not apply.

To constitute *res judicata* it is, however, not necessary that the suit need be one which the plaintiff was bound to institute. The usefulness or otherwise of a suit is a question which is entirely beside the point.

It is manifest from the above that the following conditions must be satisfied to constitute a bar of *res judicata*, viz., 1) the matter must be directly and substantially in issue in two suits ; (2) the prior suit must have been between the same parties or persons claiming under them ; (3) such parties must have litigated under the same title in the former suit ; (4) subject to the provisions contained in Explanation VII, added by the Amendment Act, 1976, the court which determined the earlier suit must be competent to try the later suit or the suit in which such issue is subsequently raised ; and (5) the question directly and substantially in issue in the subsequent suit should have been heard and finally decided in the earlier suit.

The above conditions need a detailed discussion and are considered below *in seriatim*.

1. Directly and substantially in issue.—The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue, either actually or constructively, in the former suit. The word ‘suit’ has not been defined in the Code but is understood to

embrace any proceeding in a court of law by which an individual pursues that remedy which the law allows him. The rule of *res judicata* only requires the identity of the matter in issue. In order that this condition may be fulfilled it must have been alleged by one party and either denied or admitted, expressly or by necessary implication, by the other. It is, however, not necessary that a separate issue should have been raised upon it. It is enough if the matter was in issue in substance in the former suit as also in the subsequent suit. The substance and not the form of the decision should be looked at. It is essential that the matter must be in issue directly and substantially in the suit under trial and not collaterally or incidentally.

The principle of *res judicata* does not depend on whether the causes of action in the two suits are identical. Causes of action in the two suits may be different, but the test is whether the matter directly and substantially in issue is the same in both suits and whether the parties are the same or the suit is between parties claiming under them and litigating under the same title. (*Gouri Shankar Singh v. Ram Singhasan Singh*, A. I. R. 1952 Pat. 472). The expression "cause of action" used in this connection means that the matter in dispute is substantially the same, and the parties are the same or litigating under the same title.

It is the matter in issue directly and substantially, either actually or constructively, and not the subject-matter that forms the test of *res judicata*. If the causes of action in the two suits are different, the matter in issue in them will not be the same and hence the decision in the former suit cannot operate as *res judicata*. The words 'directly and substantially in issue' in S. 11, C. P. C. are not confined to the relief granted in the former suit or to the property which was its subject-matter. The words in S. 11 also clearly imply that the decision on a matter not essential for the relief finally granted in the former suit or which did not form one of the decisions cannot be said to have been directly or substantially in issue in the former case. Thus where certain reliefs were granted in a suit to the plaintiff it is not open to the defendant to raise any plea in a subsequent suit which will interfere with the relief given in the prior suit. The principle of *res judicata* does not extend to anything more than this. (*Shree Ramiah Venkiteshiah & Co. v. N. Sundareswaran*, 1967 Ker. L. J. 237).

It is well established that it is the decision of the matter in the previous suit which operates as *res judicata* and not the reason or the basis of the decision that operates as *res judicata*. Where the title of the plaintiff to the entire property covering the subject-matter of the previous suit and the subject-matter of the subsequent suit is not directly put in issue in the previous suit, the decision in the previous suit in which observations are made with regard to the title of the plaintiff over the entire subject-matter of the two suits are merely reasonings for holding that the plaintiff was entitled to the subject-matter which was specifically in dispute in the previous suit. It is, therefore, not quite correct to say that it is the title to the property and not the subject-matter that is the basis of *res judicata*. What one has to decide is, whether in the words of S. 11, C. P. C., the matter in dispute in the subsequent suit was directly and substantially in issue in the previous suit and it was decided. (*Jai Prakash v. Bishambhar Das*, 1953 A.L.J. 696).

Collaterally or incidentally in issue.—The expression "collaterally or incidentally in issue" means only ancillary to the direct and substantial issue and refers to a matter in respect of which no relief is claimed but which is

put in issue to enable the court to adjudicate upon the matter which is directly and substantially in issue. Collateral and incidental issues are auxiliary issues, while direct and substantial issues are the principal ones. It is only those matters which are directly and substantially in issue that constitutes *res judicata* and not the matters which are in issue only collaterally or incidentally. The matter would be directly and substantially in issue if the issue was decided and judgment was, in fact, based upon that decision. Otherwise it would be a matter collaterally or incidentally in issue. An example or two will make the point clear. *A* sues *B* for the rent due for the year 1949. *B*'s defence is that no rent is due. Here the claim for rent is the matter in respect of which relief is claimed. This, therefore, is a matter directly and substantially in issue. But in another case when *A* sues *B* for rent and *B* claims abatement of rent on the ground that the area is less than that entered in the lease and the finding of the court is that the area is greater than that shown in the lease, the finding as to the excess area is not *res judicata* for this was not the matter directly and substantially in issue but only ancillary to the direct and substantial issue, viz., whether the area is equal to that shown in the lease or less.

Constructively in issue—"Might" and "Ought".—The matter directly and substantially in issue may either be actually in issue or constructively in issue, and both the matters constitute *res judicata* if the same were in issue in the former suit and were also in the subsequent suit. A matter is actually in issue when it is alleged by one party and denied by the other. It is constructively in issue when the matter *might* or *ought* to have been made a ground of attack or defence in the former suit. Explanation IV to S. 11 says that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. It may, therefore, happen that a matter though not actually in issue directly and substantially may nevertheless be regarded as having been in issue in a suit when the same might and ought to have been made a ground of attack or defence. The test is whether the parties had an opportunity of controverting it and, if they had, the matter will be treated as actually controverted and decided. When the matter is actually in issue the same is heard and decided, but when it is constructively in issue from its very nature it could not be heard and decided for this was a matter which might and ought to have been made a ground of attack or defence in the suit. Nevertheless it will be deemed to have been heard and decided against the party omitting to allege it, provided the other conditions of *res judicata* are complied with, and the plaintiff is precluded from raising in the subsequent suit the grounds of attack he might and ought to have raised in the former suit. It is no answer to a plea of *res judicata* that an argument which could be advanced was not advanced in the previous suit. And where an argument was open to the party, the fact that he did not advance it would not remove the bar of *res judicata*, if it is otherwise binding. Failure to put forward an alternative ground of the right to inherit operates as *res judicata*. (*Dhani Ram v. Pritam Singh*, A. I. R. 1955 N.U.C. 1604). But failure to raise an alternative plea, which is inconsistent with the main plea, would not operate as *res judicata* (*ibid*). Where, however, a suit was dismissed on the plea of limitation and was not finally decided on merits, a subsequent suit in which the same pleas are raised is not barred by the rule of *res judicata*. (*Har Sarup v. Anand Sarup*, 1942 A. L. J. 504).

The words 'might' and 'ought' have wide amplitude. The word 'might' conveys the idea of possibility of joining all grounds of attack or defence,

'Ought' carries the idea of propriety of so joining. The theory of *res judicata* is based on the doctrine that no party should be vexed again over the same cause. An alternative basis on which a claim can be sustained should be set up in any suit to enforce the claim. When it is not set up, the basis omitted in the prior suit should not be allowed to sustain the second suit.

Though a plea might have been set up by the plaintiff in the former suit the answer to the question whether he ought to have set up such a plea in the alternative in that suit would vary on the facts of each case. No hard and fast rule can be laid down. But at the same time, though no definite rule can be laid down on the point, it is now well settled that where the matters are so dissimilar that their union might lead to confusion, the plea ought not to be set up.

Pleas that would make the suit bad for multifariousness or would embarrass the trial thereof and the pleas, the evidence in support of which is such that it might be destructive of the other pleas, come within the expression 'where matters are so dissimilar that their union might lead to confusion.' [*Nanda Penthoi v. Padam Penthoi*, I.L.R. (1966) Cut. 307].

An illustration or two will make the point clear. The plaintiff, *A*, sues *B* on a contract and obtains a decree. *B* cannot afterwards sue for rescission of the contract on the ground that it did not fully represent the agreement between the parties, for this was a matter which might and ought to have been made a ground of defence in the earlier suit. Similarly, *A*, a Hindu, dies leaving a widow, who makes a gift to her brother *B* of certain property belonging to her husband *A* and, after the death of the widow, one *C* alleging that he and *A* were members of a joint Hindu family sues *B* for a declaration of his title to the property by right of survivorship. *C* cannot subsequently sue *B* to recover the same property as the nearest reversionary heir of *A* once the suit is dismissed on the finding that *A* and *C* were separate. The suit is barred by *res judicata*, for *C* might and ought to have set up his title by heirship as a ground of attack in the former suit in the alternative.

A suit for partition between coparceners should embrace the entire family property. It is incumbent on the parties to bring all the properties into the hotchpot. In the absence of mistake, fraud or accident or withdrawal with liberty to file a fresh suit a second suit for partition on the ground that the previous partition was a partial one would be barred by Explan. IV to S. 11, C.P.C. [*Chandu v. Kirpa Ram*, A.I.R. 1952 H. P. 65.]

The same thing applies to the defendant. He cannot raise such grounds of defence in the subsequent suit which might and ought to have been raised in the former suit. *A* files a suit against *B* to recover money on a promissory note. *B* contends that the promissory note was obtained from him by undue influence. The suit is decreed in spite of this objection. The defendant subsequently wants to challenge the promissory note by a fresh suit on the ground of fraud and coercion. This he cannot do as it was his duty to have resisted the former suit on the ground of fraud and coercion as well.

H, who was in possession of certain property sought a declaration of his sole right to that property to the exclusion of his brother. The defendant raised many pleas but no plea that under a family arrangement he too was a sharer in that property. In a subsequent suit for possession of property alleged to be *H*'s the defendant raised a plea of family arrangement. It was held that the plea ought to have been raised in the previous suit and was barred by the principle of *res judicata*.

In mutation proceedings *H* admitted the right of his brother to certain property and belonging to both *H* and his brother. It was held that in a subsequent suit for recovery of possession of that property he was estopped from denying the brother's right. (*Har Sarup v. Anand Sarup*, 1942 A. L. J. 504).

The general rule is that if a matter could have been set up as a ground of attack or defence in the alternative in the former suit, and if its introduction into that suit was necessary for a complete and final decision of the right claimed by the plaintiff therein, it will be deemed to be a matter which ought to have been made a ground of attack or defence in that suit, unless the matters in that and the subsequent suit are so dissimilar that their union might lead to confusion.

Failure to raise an alternative plea, which is inconsistent with the main plea, would not operate as *res judicata* (*Dilip Kaur v. Chanan Singh*, A. I. R. 1955 N. U. C. 1609). Nor would failure to put forward a claim on the basis of a right acquired during pendency of the suit operate as *res judicata* and the party is not bound in law to put forward the claim in the pending suit.

The rule of constructive *res judicata* would not apply to a point which the court may or may not decide in its discretion. In order that the rule of 'might and ought' may apply it is not only necessary that the defendant could have raised defence in reply to the former suit, but it must also be shown that he was bound to do so. The correct principle is that if the decree made in the earlier suit is such that it would be inconsistent with the plea which might and ought to have been raised, but not actually raised, it must be taken that there has been, for the purpose of *res judicata*, a final decision by necessary implication. (*Bishnupada Samanta v. Munshi Muhammad Esmail*, 157 I. C. 381).

When no finding was given on an issue in the previous suit the judgment therein cannot operate as *res judicata* in a subsequent suit, on the ground that the finding must be assumed to have been given as an inference. Explanation IV to S. 11, C. P. C., would be of no assistance in such a case. (*Hayatuddin Haji Shujaiddin v. Abdul Gani*, 1975 Mah. L. J. 345).

2. Between the same parties.—The second essential condition to constitute the bar of *res judicata* is that the former suit must have been a suit between the same parties or between parties under whom they or any of them claim. *Res judicata* not only affects the parties to the suit but their privies, *i. e.*, persons claiming under them. A judgment not *inter partes* or *in rem* is not *res judicata* in a subsequent suit though it may be received in evidence.

Representative Suit.—Explanation VI to S. 11 says that where persons litigate *bona fide* in respect of a public right or a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating. It thus refers to cases in which a decision in a suit may operate as *res judicata* against persons not expressly named as parties to the suit, *i. e.*, in a representative suit.

Explanation VI to S. 11 is however, not limited only to a representative suit governed by O. 1, r. 8, C. P. C. It applies in other suits also. Explanation VI is not controlled by the provisions of O. 1, r. 8, C. P. C., because there must be a suit in which a person claims a right in common to himself and others, though not governed by O. 1, r. 8, C. P. C., (*Mst. Sudehaiya Kunwar v. Ram Dass Pandey*, 1957 A. L. J. 498).

If the parties in the subsequent suit can be said to have been represented by the parties in the former suit, the decision in the former suit will bind the parties in the subsequent suit. A decree passed against a *shebait* or a trustee will also bind his successor. Dismissal of a suit brought by the managing member of a joint family is a bar to a subsequent suit by a junior member who had been *pro forma* defendant in the former suit, in respect of the same property and on the same cause of action. (*Kunj Man v. Jagannath*, 42 A. 359). The son is bound by the decision against the father.

The decision in a case in respect of a public right is binding on all persons interested in that right as for purposes of S. 11, C. P. C. they will be deemed to claim under the persons who litigated in the earlier suit in respect of that public right. (*Wajf Khudawand Taala v. Seth Mohan Lal*, 1956 A. L. J. 225).

One *D* as reversioner filed a suit against a Hindu widow and a donee from her for cancellation of the gift deed on behalf of himself and *R*, a cousin who was at that time a minor living under his guardianship. The suit was dismissed on the ground that the last owner left a sister (*S*) and that she was a nearer heir than *D* and *R*. *R* was not a party to the suit. After the death of the widow, *R* instituted the suit against the donee from the widow and *S*, impleading *D* as a *pro forma* defendant, for possession. It was found that *S* was not a sister of the last owner and that the plaintiff and *D* were the next reversioners. On these facts it was held that Explanation VI to S. 11, C. P. C. applied and *R* must be deemed to be claiming under *D*, who litigated in the earlier suit, and under section 11 the decision in the previous suit would operate as *res judicata* and prevent *R* from reagitating the same question.

Explanation VI is couched in the wide language and applied whenever a person claims a right, private or public, in common to himself and others, provided he does so *bona fide*. Even when a suit is brought by a person who challenges an alienation made by a Hindu widow on the ground of its being without legal necessity, if the plaintiff claims the right in common to himself and others similarly situated and has filed the suit *bona fide*, Explanation VI applies, because all its requirements are fulfilled.

For the applicability of the Explanation what one has to consider is the claim actually made by the plaintiff in the previous suit and not the result or decision of the previous suit. Whether a decision is *res judicata* or not does not depend upon its nature. (*Mt. Sudehaiya Kunwar v. Ram Dass Pandey*, 1957 A. L. J. 498).

Explanation VI to S. 11, C. P. C., refers to a case in which the person sought to be bound by the decision is deemed to be represented in the previous suit by virtue of proceedings having been taken under O. 1, r. 8, C.P.C., or otherwise. Where the previous suit was not representative and the persons sought to be bound by the decision arrived at in that case cannot be deemed to have been represented in that litigation, Explanation VI to S. 11, C. P. C., can have no application. (*Pt. Madhua Nand v. Pt. Suresha Nand*, 1953 A.L.J. 246).

Where the parties are different in two suits, the findings in the previous suit cannot be *res judicata* in the subsequent suit unless it is shown that the plaintiffs in the subsequent suit are claiming under the plaintiffs in the previous suit and the plaintiffs in the previous suit had claimed the right in common for themselves and for the plaintiffs in the subsequent suit.

Where the plaintiffs in the earlier suit and the later suit are not the same or parties who claim through each other, S. 11 in terms cannot apply. Where S. 11 is thus inapplicable it would not be permissible to rely upon the general doctrine of *res judicata*. (*Janakiram Iyer v. Nilkanta Iyer*, A. I. R. 1962 S. C. 633).

Pro forma defendant.—A *pro forma* defendant in a suit would ordinarily be as much bound by the decision therein as any other defendant. (*Sethurama Iyer v. Ramchandra Iyer*, 38 I. C. 184). But where in the former suit, no relief was claimed against him and the nature of the two suits is wholly dissimilar and the cause of action arose only in consequence of the decision in the first suit, the second suit is not barred. To the same effect are the observations in yet another case that a party unnecessarily impleaded in the previous suit is not bound by a decree therein. (*Narain Singh v. Raj Kumar Singh*, 44 All. 428). A party may be joined as a defendant in a suit merely because his presence is necessary in order to enable the court to effectually and completely adjudicate upon the questions involved in the suit. In such a case no relief is sought against him and the matter in issue in the suit is not in issue between him and any other party. A decision in such a suit cannot be *res judicata* against him or his representatives-in-interest in subsequent proceedings.

Res judicata between co-defendants.—The principle of *res judicata* also applies to parties arrayed on the same side as between plaintiffs themselves or between defendants themselves. It was observed in *Cottingham v. Earl of Shrosbury*, (3 Hare, 627 at 638) as far back as in the year 1843 that “if a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the court will try and decide the case, and the co-defendants will be bound. But if the relief given to the plaintiffs does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains.” The above observations were in answer to the question as to when can a matter be *res judicata* between co-defendants. Three things emerge from the dictum laid down in the case cited above when the doctrine of *res judicata* can be applied as between co-defendants, viz.,

- (a) There must be a conflict of interest between co-defendants ;
- (b) It must be necessary to decide that conflict in order to give the plaintiff appropriate relief ; and
- (c) There must be a decision of the question between the co-defendants.

The doctrine of *res judicata* as between parties who have been co-defendants in a previous suit may apply even though the party, against whom it is sought to be enforced, did not in the previous suit think fit to enter an appearance and contest the question. But to this the qualification must be added that, if such a party is to be bound by a previous judgment, it must be proved clearly that he had or must be deemed to have had notice that the relevant question was in issue and would have to be decided. (*Chandu Lal Agarwala v. Khalilur Rahman Khan*, 1950 M. W. N. 166 ; *B. C. Govinda Reddy v. K. N. Suryanarayana Rao*, (1966) 2 An. W. R. 46].

It is settled by a large number of decisions that for a judgment to operate as *res judicata* between or among co-defendants, it is necessary to establish that : (1) there was a conflict of interest between co-defendants ; (2) that it was necessary to decide the conflict in order to give the relief which

the plaintiff claimed in the suit ; and (3) that the court actually decided the question.

In *Chandu Lal v. Khalilur Rahaman*, [77 I. A. 27 : A. I. R. 1950 P. C. 17], Lord Simonds said :

“It may be added that the doctrine may apply even though the party against whom it is sought to enforce it, did not in the previous suit think fit to enter an appearance and contest the question. But to this the qualification must be added that, if such a party is to be bound by a previous judgment, it must be proved clearly that he had or must be deemed to have had notice that the relevant question was in issue and would have to be decided.”

Their lordships of the Supreme Court observed in *Istikhar Ahmed v. Syed Meharban Ali (dead) through Lrs. and others* [(1975) 1 S. C. J. 305] that they saw no reason why a previous decision should not operate as *res judicata* between co-plaintiffs if all these conditions are *mutatis mutandis* satisfied. In considering any question of *res judicata* they have to bear in mind the statement of the Board in *Sheoparsan Singh v. Ramanandan Prasad Narayan Singh*, (43 I. A. 91 : A. I. R. 1916 P. C. 78, that the rule of *res judicata* “while founded on ancient precedent is dictated by a wisdom which is for all time” and that the application of the rule by the Courts should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law.

“The *raison d'être* of the rule is to confer finality on decisions arrived at by competent courts between interested parties after genuine contest ; and to allow persons who had deliberately chosen a position to reprobate it and to blow hot now when they were blowing cold before would be completely to ignore the whole foundation of the rule.” (See *Ram Bhai v. Ahmad Said Akhtar Khan*, A. I. R. 1938 Lah. 571).

That a decision operates as *res judicata* between co-defendants if certain conditions are fulfilled is well settled. These conditions are :

1. There was a conflict of interest between the defendants ;
2. That it must be necessary to decide this conflict in order to give the plaintiff the relief he claims ; and
3. That the question between the defendants must have been finally decided : *Munni Bibi v. Triloki Nath*, A. I. R. 1931 P. C. 114, *Kishun Prasad v. Durga Prasad*, A. I. R. 1931 P. C. 231, *Dhan Singh v. Joint Director of Consolidation*, A. I. R. 1973 All. 283.

The law which applies to a case of co-defendants equally applies to a case of co-plaintiffs : (See *Shyama Bhai v. Purshothamados*, A. I. R. 1925 Mad. 645, *Bachat Kaur v. Karam Chand*, A. I. R. 1948 Lahore, 195, *Bhudeo Pandey v. Gupteshwar Missir*, A. I. R. 1951 Pat. 537, and *Deoki Amma v. Raghavan*, A. I. R. 1961 Kerala, 224.

The doctrine should, however, be applied to co-defendants with great caution.

Res judicata between co-plaintiffs.—The same conditions as apply to the case of co-defendants for constituting *res judicata* between themselves also apply to the case of co-plaintiffs.

A finding to become *res judicata* as between co-plaintiffs must have been essential for giving relief against the defendant. It must be also on points actively contested between the co-plaintiffs. (*Mookan v. Naga Pillai*, 38 I. C. 213). But where in the prior suit it was not necessary to decide the rights of the plaintiffs *inter se* for granting relief as against the defendants and the later suit relates to the individual right of one of the original plaintiffs, the prior decision will not operate as *res judicata*.

It is well-settled that unless there is an active contest between the parties arrayed on the same side in the previous suit, a decision with regard to which contest is necessary for the final determination of the matter in controversy in the suit, any decision given in the previous suit cannot operate as *res judicata* between them or between parties claiming through or under them in any subsequent suit. (*Mt. Bachint Kaur v. Karam Chand*, A. I. R. 1948 Lah. 195).

Res judicata and judgment in rem.—A judgment in a suit is binding only upon the parties to the suit and their privies. It is, as a general principle, not binding upon a third party, who had no opportunity to lead evidence, to controvert witnesses or to appeal from the judgment. An exception to this rule is, however, afforded by a class of judgment known as judgment *in rem*. It is a judgment which binds the world at large and not only the parties to the proceeding and their privies, and is opposed to a judgment *in personam*, which is directed against a specific person or specific persons. A final judgment of a court exercising probate, matrimonial, admiralty or insolvency jurisdiction is a judgment *in rem* and is dealt with under S. 41 of the Indian Evidence Act. Judgments *in rem* fall outside the scope of S. 11 of the Code.

Hindu widow and reversioners.—A decree passed against a Hindu widow representing the estate of her husband is binding upon the reversioners unless it could be shown that there had not been a fair trial of the right in that suit. (*Risal Singh v. Balwant Singh*, 40 All. 593, P.C.)

Minor.—A decree passed against a minor properly represented is binding upon him ; but a decree against a minor not properly represented in the suit is a nullity and the rule of *res judicata* does not apply. Section 11 will, therefore, have no application to an action by a minor to have a decree vacated on the ground of the gross negligence of the guardian. A decree against a minor can be attacked in a separate suit on the ground of gross negligence of the guardian, even though fraud and collusion on the part of the guardian is not established, or if defence which might and ought to have been raised by the guardian is not raised, or if the minor was an unnecessary party. [*Rameshwar Bakhsh Singh v. Mt. Ridd Kuer*, A. I. R. (1925) Oudh, 633, and *Narain Singh v. Raj Kumar Singh*, 44 A. 428]. If, therefore, the prior judgment is vacated on the ground of the guardian's fraud, negligence or collusion, the decision will not operate as *res judicata*.

3. **Litigating under the same title.**—The third essential condition to constitute the bar of *res judicata* is that the parties must have litigated under the same title in the former suit. The expression "litigating under the same title" means litigating in the same capacity. Thus a suit brought by a person to recover possession from a stranger of *math* property claiming it as heir of the deceased Mahunt is no bar to a suit by him as manager of the *math*, if the first suit is dismissed on his failure to produce the succession certificate for the two suits arise under different capacities.

It does not matter if the transfer attacked in one case is a mortgage and in the other case a gift. (*Bhagwan Singh v. Mt. Ishar Kaur*, 140 I. C. 796). All that the phrase "litigating under the same title" connotes is that the demand should have been of the same quality in the second suit as in the first. (*Abdul Gani v. Narendra Kishore Ray*, 57 C. 258). Where the right of the temple was first agitated by the trustees and later by worshippers, the later suit is barred by *res judicata*. A decision, however, against a person in his individual capacity does not bind his successor in the office of trustee of an endowment. Where the first suit was filed as a reversioner, the later suit filed as a member of a joint family is not barred. The principle of constructive *res judicata* does not apply if the second suit is instituted by the same person in a different capacity.

A dispute arose between the daughter-in-law and her adopted son on the one hand and the mother-in-law on the other in regard to the validity of the adoption and it was referred to arbitration and the decree was made in terms of the award. The award declared that the adoption of the plaintiff was not valid; and that the right of adoption was lost to the daughter-in-law from the very beginning, but the mother-in-law was directed to pay the adopted son Rs. 8,000, and to pay maintenance to the daughter-in-law both of which she did. Subsequently acting upon a decision of the Privy Council the daughter-in-law adopted the same person who filed the present suit. It was held that the plaintiff in the present suit was litigating under the same title, *i. e.*, in the same right as the adopted son, though that claim of his was sought to be based on a later adoption than the one in the former suit; and that as the decree was one in terms of the compromise, S. 11, C. P. C., would not be strictly applicable to the same, but the underlying principle of estoppel would still apply and the plaintiff was estopped from contending that his adoptive mother had a right to adopt. The declaration in the award that the right of adoption was lost to the daughter-in-law was a representation on which the mother-in-law acted by paying the plaintiff and the plaintiff having received the sum was estopped. (*Sunderabai v. Devaji Shankar Deshpande*, A. I. R. 1954 S. C. 82).

Decision in Probate Proceedings.—Questions of title are not decided in proceedings for the grant of probate or letters of administration. Whatever therefore might have happened in those proceedings would not establish the title. Where on an application for letters of administration of a will, certain preliminary issues were framed one of which related to estoppel with respect to the opposite party's right to a property and the application was dismissed under O. 17, r. 2, C. P. C. on account of non-appearance of the applicant, no question of *res judicata* as to the title to the property can arise against the applicant by reason of that dismissal. (*Hem Nalini v. Isolyne Sarobashini Bose*, A. I. R. 1962 S. C. 1471).

4. Competency of Court to try the subsequent suit.—The fourth condition is that the court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue is subsequently raised. The decisions of the courts of limited jurisdiction shall, in so far as such decisions are within the competence of the courts of limited jurisdiction, operate as *res judicata* in a subsequent suit although the court of limited jurisdiction may not be competent to try such subsequent suit or the suit in which such question is subsequently raised.

A revenue court decision on a question of title will not bar a suit in the ordinary civil courts, unless otherwise provided by law. (*Raja Mohammad*

Abdul Husain Khan v. Prag, 38 I. C. 418, P. C.). A finding of a criminal court also does not bind the civil court.

The section initially applied only when the court whose decision is cited as *res judicata* was competent to try the second case. The expression "competent to try" means competent to try the subsequent suit if brought at the time the first suit was brought. Competency relates both to pecuniary jurisdiction and subject-matter, which must be concurrent. It has no reference to territorial jurisdiction. Where property in two suits is identical, the mere fact that its value has risen in the interval between the two suits and the subsequent suit is, therefore, beyond the pecuniary jurisdiction of the former court, cannot affect the question of *res judicata*.

In order to determine whether a court which decided the former suit has jurisdiction to try the subsequent suit, regard must be had to the jurisdiction of that court at the date of the former suit and not to its jurisdiction at the date of the subsequent suit. If at the time such a court would have been competent to try the subsequent suit, had it been then brought, the decision of such court would operate as *res judicata* although subsequently by a rise in the value of the property that court had ceased to be a proper court, so far as regards its pecuniary jurisdiction to take cognizance of a suit relating to that very property was concerned. (*Jeevantha v. Hanumantha*, A. I. R. 1954 S. C. 400).

A judgment in a previous suit was not to operate as *res judicata* in a subsequent suit in respect of the same subject-matter if the value of the relief in the subsequent suit was above the pecuniary limits of the jurisdiction of the court which decided the previous suit. The competency of the court to try the subsequent suit has to be judged with reference to the time when the earlier suit was brought. If a decision has been given by a competent court in a previous suit regarding part of the claim in the subsequent suit, then so much of the claim which is common to the two suits should be excluded from the subsequent suit as barred by *res judicata*. If a decision is not *res judicata*, it will not operate as estoppel.

Explanation VIII, added by the Amendment Act, 1976, has completely changed the concept of the competency of the court to try the subsequent suit by providing expressly that the decision of the court of limited jurisdiction on any issue which is within the competence of the court of limited jurisdiction shall operate as *res judicata* in a subsequent suit although such court of limited jurisdiction may not have been competent to try such subsequent suit or the suit in which such issue has been subsequently raised.

Section 43 of the Specific Relief Act, 1877 (S. 35 of the Specific Relief Act, 1963) has not the effect of abrogating the limitation imposed by S. 11, C. P. C., as regards the competency of the court which passed the previous decree for a declaration. Section 43, Specific Relief Act, must be read subject to S. 11, C. P. C., and no exception with regard to declaratory suits and decrees can be read into S. 11, C. P. C. (*Sarangapani Ayyangar v. Venkata Narasimhacharyulu*, 1951 M. W. N. 795).

Meaning of "such subsequent suit".—The word "suit" has not been defined in the Code ; but there can be little doubt that in the context (*i. e.*, competency of court to try the subsequent suit) the plain and grammatical meaning of the word would include the whole of the suit and not a part of the suit, so that giving the word "suit" its ordinary meaning it would be

difficult to accept the argument that a part of the suit or an issue in a suit is intended to be covered by the said word in the material clause. It is the whole of the suit which should be within the competence of the court at the earlier time and not a part of it. Having regard to the legislative background of S. 11 there can be no hesitation in holding that the word "suit" in the context must be construed literally and it denotes the whole of the suit and not a part of it or a material issue arising in it. (*Gulab Bai v. Manphool Bai*, A. I. R. 1962 S. C. 214).

Where the title to properties put in issue in a subsequent suit in the civil court was earlier tried in the revenue court, but that court being not competent to try the subsequent suit in which the same issue was raised, it has been held that in terms of S. 11 of the Code the decision on the said issue in the revenue court could not operate as *res judicata*, for the necessary condition of competency of that court to try the subsequent suit was lacking. (*Bhagwan Dayal v. Reoti Devi*, A. I. R. 1962 S. C. 287).

Effect of appeal.—The competence of the trial court deciding the former suit is the test and not that of the appellate court. (*Kammu v. Mt. Fahiman*, 44 A. 712). Where, therefore, the plaintiff's suit was decreed both on the question of title as well as on a plea of adverse possession and the same was confirmed on appeal, but in second appeal the question of adverse possession was not argued or considered it was held that the adjudication as to adverse possession would operate as *res judicata* in a later suit.

Effect of Pending Appeal.—A judgment against which an appeal has been filed cannot be *res judicata*. Where, therefore, the property in dispute was the subject-matter of previous litigation between the parties and the matter was still pending in appeal, a subsequent suit between the parties in respect of the same property is not barred by *res judicata*. (*Parshottam Parbhudas v. Bai Moti*, A. I. R. 1963 Gujarat, 30).

5. Heard and finally decided by the court in the first suit.—The last condition is that the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit. The section requires that there should be a final decision on which the court has exercised its judicial mind. A matter will be said to have been heard and finally decided notwithstanding that the former suit was disposed of *ex parte* or by dismissal under O. 17, rule 3, *i. e.*, for failure to produce evidence when time was allowed to do so, or by a decree on an award or by dismissal owing to plaintiff's failure to adduce evidence at the hearing. But it is necessary that the decision in the former suit must have been on the merits and so the matter cannot be said to have been heard and finally decided when the former suit was dismissed by the trial court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of non-joinder or mis-joinder of parties, on account of multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letters or administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional court fee on a plaint which was undervalued, or for want of a cause of action, or on the ground of limitation, or on the ground that it is premature and the dismissal is confirmed in appeal (if any), the decision not being on the merits would not be *res judicata* in a subsequent suit. (*Sheodan Singh v. Daryao Kunwar*, A. I. R. 1966 S. C. 133).

In order to ascertain what matter was heard and finally decided, the pleadings and the judgment should be examined. Express decision is not necessary, it being sufficient that an adjudication on the matter is necessarily involved. Nor need it be embodied in the decree. Dismissal of a suit on the ground that the plaintiff was not entitled to raise the plea on which the suit was founded, without any inquiry into his title, cannot be taken to be a decision that for all time and in all proceedings between the parties it must be taken that the plaintiff had no title. Where a suit is dismissed as being premature, the decision is no bar to the filing of a further suit. (*Sham Sunder v. Chandu Lal*, 1935 Lah. 974).

If a point decided by the trial court is left undecided by the appellate court in disposing of the appeal, the finding of the trial court will not be *res judicata*. (*Lukh Narain Jagdeo v. Jodu Nath Deo*, 21 C. 504, P. C.). Where, therefore, a decree is appealed from, it is the appellate decree that must be looked into to determine the question of *res judicata* and not the decree of the trial court.

Where a former suit between the same parties in the same court and for the same relief results in a decree of dismissal without deciding the matters affecting the rights of the parties and leaving it open to the plaintiff to bring a fresh suit, the decree does not constitute *res judicata* as the matters cannot be said to have been heard and finally decided.

Then the determination in the former suit must have been necessary to the determination of that suit. It is the right of appeal that indicates whether a finding was necessary or not. A finding on an issue cannot be said to be necessary to the decision of a suit unless the decision was based upon that finding. Thus in a suit by *A* against *B* for ejectment, *B* contends that no notice to quit was given and that the land being common land he was not liable to be evicted at all. The suit is dismissed on the finding that no notice to quit was given. The court, however, also finds that the land was not common land. This second finding was irrelevant to the disposal of the suit and does not operate as *res judicata* so as to preclude *B* from raising the same contention in a subsequent suit, the reason being that *A*'s suit having been dismissed *B* could not have appealed from the finding that the land was not common land.

Explanation V to S. 11 may also be noted in this connection. It says that any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused. The legal effect of this explanation is that of treating the omission to grant the relief asked for in the plaint as equivalent to an express refusal and the claim thereto in a fresh suit as *res judicata*.

Identity of issues.—In order to apply the principle of *res judicata* it is essential requirement that the actual issue in the two suits must be identical. Where the question at issue is not the same or *eadem questio* in the two proceedings, the principle of *res judicata* does not apply. Where in a writ application the validity of the levy and collection of certain tax under a State Act is questioned, the decision in a prior writ proceeding about the validity or the levy and collection of similar tax under a prior and different Act of the State Legislature does not operate as *res judicata*, since the question at issue in the two proceedings is not the same. What becomes *res judicata* is the matter which is decided and not the reason which leads the Court to decide the

matter. Neither the reasoning nor the mental process can operate as *res judicata*. What could not be challenged and what had become conclusive was the actual decision given in the former suit. (*Patna Zilla Truck Owners Association v. State of Bihar*, A. I. R. 1963 Patna, 16).

Adverse finding.—As said above, if a decree is wholly in favour of the defendant no issue decided against him can operate as *res judicata* in a subsequent suit for he cannot appeal from the adverse finding. Conversely, if the plaintiff's suit is decreed in its entirety no issue decided against him can be *res judicata*. (*Rum Bahadur Singh v. Lucho Koer*, 11 Cal. 301, P. C.). To cite an illustration, A, alleging that he is the adopted son of X, sues B to recover certain property granted to him by X, under a deed and forming part of the estate of X. The court finds that A is not the adopted son of X, but he is entitled to the property under the deed and a decree is passed for A. The finding that A is not the adopted son of X will not operate as *res judicata* in a subsequent suit between A and B in which the question of adoption is again put in issue, for, the decree being in favour of A, A could not have appealed from that finding. The court having found that A was entitled to the property under the deed, the finding on the question of adoption was not necessary to the determination of the suit, and the decree was not founded on that finding.

The Calcutta and Nagpur High Courts have gone to the length of holding that where an adverse finding is expressly challenged in appeal by the defendant but the appellate court allows the appeal on another ground and dismisses the suit the finding will not stand or operate as *res judicata*. (*Wariskhan v. Ahmadullakhan*, I. L. R. 1949 Nag. 313).

But an adverse finding may be *res judicata* in certain exceptional cases as where A's suit against B is dismissed, but B's costs are disallowed as the finding on the main issue went against B. This finding will be *res judicata* for it was open to B to have appealed on the question of costs and reagitated the finding on the main question against him. (*Veeraswami Mudali v. Palaniyappan*, 1942 Mad. 626).

Unnecessary finding.—Matter which was not necessary for the decree passed in the suit is not matter directly and substantially in issue in the suit which was heard and finally decided. (*Rum Bahadur Singh v. Lucho Koer*, 11 Cal. 301, P.C.). If a finding arrived at on a certain issue is sufficient to completely dispose of the case, findings on other issues not necessary for the disposal of the case are not final decision of the matter covered by them and do not operate as *res judicata*. A finding on an unnecessary or irrelevant issue does not operate as *res judicata*. Thus where a suit is held to be not maintainable, decision on other issues is not *res judicata*.

When decision on each issue operates as *res judicata*.—Where the final decision in any matter at issue between the parties is based by a court on its decision on more than one point, each of which by itself would be sufficient for the ultimate decision, the decision on each of these points operates as *res judicata* between the parties. (*Vithal Yeshwant v. Shikandrakhan*, A. I. R. 1963 S. C. 385).

Whether S. 11 is exhaustive.—It has been held by their Lordships of the Judicial Committee in a number of cases that the section is not exhaustive. In *Kalipada v. Dwijapada* (57 I. A. 24) it was observed that application of the rule by the courts in India should be influenced by no technical consideration

of form, but by matter of substance within the limits allowed by law. The principle which prevents the same case being twice litigated is of general importance and is not limited by the specific words of the Code in this respect.

The following paragraphs are illustrative of the above principle.

Ex parte decree.—An *ex parte* decree will operate as *res judicata* if the court has brought to bear its mind on the issues or if the defendant could have put in appearance and raised the same plea which he raised in the subsequent suit. A decision on an unnecessary point will not operate as *res judicata*.

Unless some portion of the decree had been satisfied it could not be said that an interlocutory *ex parte* order amounted to *res judicata*. An order bringing the heirs of the judgment-debtor on the record, cannot be said to be one 'fructifying' a decree nor can the mere attachment of property in execution proceedings be said to be such fructification. (*Mannu Lal v. Hunuman Singh*, A. I. R. 1951 All. 398).

Consent and compromise decrees.—Section 11 is not strictly applicable to compromise decrees as it applies in terms only to what has been heard and finally decided by the court. Such a consent or compromise decree is, however, effective with reference to the conclusions arrived at, provided the court on the facts proved must come to a clear conclusion that the parties intended that the consent decree should have the effect of deciding the question finally. In such circumstances the principle of *res judicata* has been applied even to consent decrees. Moreover a judgment by consent also raises an estoppel between the parties as well as their representatives-in-interest when the question raised in the subsequent suit was present to the minds of the parties and was actually dealt with by the consent decrees. In order to effect an estoppel it is also necessary that it should appear on record that the question had been put in issue. (*Gokul Prasad v. Hari Saran Das*, 22 Luck. 270).

A consent decree does not operate as *res judicata*, because a consent decree is merely the record of a contract between the parties to a suit, to which is superadded for seal of the court. A matter in contest in a suit may operate as *res judicata* only if there is adjudication by the court. The terms of S. 11 leave no scope for a contrary view. (*Baldevdas Shirlal v. Filmistan Distributors (India) Pvt. Ltd.* [(1970) 1 S. C. J. 342]).

A compromise decree is not a decision of the Court on an application of its mind and the statutory bar of *res judicata* is not attracted. But at the same time a judgment by consent or default is as effective an estoppel between the parties as the judgment whereby the Court exercises its mind on a contested case. Even though the matter may have passed from the stage of representation into an agreement, there are cases where the Courts are entitled to entertain a plea of estoppel in order to prevent fraud or circuitry of action. (*Garaj Narain Singh v. Babulal Khemka*, A. I. R. 1975 Pat. 58).

Dismissal for default.—Where the prior suit has been dismissed for default, there has been no decision on the merits of the case and no matter in issue has been heard and finally decided in the suit within the meaning of S. 11, C.P.C., so as to operate as a bar to the same question being raised in a subsequent suit. An order of dismissal on an execution petition on the ground that it was not being pressed does not operate as *res judicata*. Where an objection petition in an execution proceeding is dismissed for non-prosecution,

there is no adjudication on the merits and it cannot be *res judicata*. (*Bahir Das Pal v. Grish Chandra Pal*, 67 I. C. 663).

But there is no difference between an appeal which may have been dismissed on a preliminary ground and an appeal which may have been dismissed in default. If an appeal is dismissed in default then the judgment and decree of the trial court passed on merits shall operate as *res judicata* because the effect of dismissal of the appeal in default of the appellant is confirmation of the decision of the trial court on merits. That being so, dismissal of the second appeal by the Board of Revenue in default will be deemed to be decision of the appeal on merits and as it has the effect of confirmation of the judgment and decree of the Additional Commissioner, made on merits, the said judgment and decree of the Board will be deemed to be "heard and finally decided". Consequently the principle of *res judicata* applies. (*Khudia v. Ram Phal*, 1973 A.L.J. 695).

Court deciding question which was *res judicata*.—Before a decision can operate as *res judicata* it must be a decision of a court having jurisdiction. Where a question between the parties was already decided by a competent court a decision *inter partes* by another court on the matters settled by the former court would be without jurisdiction and cannot operate as *res judicata*. (*Pritam Kumar v. State of Pepsu*, A.I.R. 1963 Punjab, 9).

Obiter dictum.—A mere opinion of the court on a matter not necessary for the decision of the case and not arising out of the issues before it is an *obiter dictum* and cannot be said to be a decision on any issue, and is, therefore, not *res judicata*. (*ibid*).

Execution Proceedings.—Section 11, as originally enacted, was in terms not applicable to execution proceedings as it related to matters decided in suits. It was only on principles analogous to the section that *res judicata* could be applied to execution proceedings. (*Ram Kirpal v. Rup Kuari*, 6 All. 269 P. C.). The doctrine that a decision at one stage of execution proceedings cannot be questioned at a later stage of the proceedings proceeded not on the ground of *res judicata* under S. 11, but under the general principles of law that there should be an end to litigation. A finding not challenged in appeal cannot be disputed in execution. An order allowing claim to rateable distribution becomes final when not appealed against and the principle of *res judicata* would apply to it. Explanation VII, added by the Amendment Act, 1976, specifically lays down that the principles of *res judicata* apply to execution proceedings. The doctrine of constructive *res judicata* already extended to the execution proceedings, by virtue of a long catena of decisions, including Supreme Court decisions. The insertion of the explanation, therefore, appeared to be superfluous.

It was observed in *Ram Kirpal v. Rup Kuari* (11 I. A. 37) that if a particular construction is put on a decree in proceedings on a former application for execution, it is not competent to the court to treat that construction as erroneous and put another construction on it at a subsequent stage of the execution proceedings.

Applicability of Constructive *Res judicata* to execution proceedings.—It is true that the principle of constructive *res judicata* does not apply to execution proceedings, but it is well established that where a definite point was raised and a definite finding recorded on it by the court, the same question cannot be

reagitated in execution department. (*Manmohan Das v. Radha Rani*, 1944 A. L. J. 490).

The principle of constructive *res judicata* is applicable to execution proceedings and, apart from lack of inherent jurisdiction of the court, the rule will operate to preclude a party even from relying a defect of jurisdiction when he has failed to do so earlier. (*Mohanlal Goenka v. Benoy Krishna*, A. I. R. 1953 S. C. 65).

Where in execution of a compromise decree the executing court ordered execution to proceed against a particular item without any objection by one of the judgment-debtors that the decree was not valid and binding by reason of his not being a signatory to the compromise, he will be barred by the principle of constructive *res judicata* from raising the objection subsequently. Even if the objection pertains to jurisdiction it is not such as to deprive the court of all its jurisdiction to execute the decree as it stands. (*Raman v. Ambujahkshi Amma*, A. I. R. 1962 Kerala, 15).

Where an application for execution had proved fructuous in part or in whole, for instance, where a certain property had been sold in execution of the decree and the sale confirmed as if the application was not open to any objection on the score of limitation, then, even though the judgment-debtor had not raised any objection on that ground, it must be deemed that the court at least by implication decided that the application was within time and that therefore a subsequent objection that the application for execution had been made beyond time was barred by the rule of constructive *res judicata*. Where objection on the score of limitation was not raised either before the sale or even before its confirmation, but was raised only after the Amin had been directed to deliver possession, the objection cannot be entertained. (*Ram Adhar v. Nem Kumar*, 1952 A. L. J. 238).

Whether *res judicata* applies to orders.—The conditions laid down in S. 11, C. P. C. can be satisfied even in the cases where orders are passed by courts and not decrees. Orders are also passed after hearing the parties and can be final in those proceedings in which they are passed. The principle of *res judicata*, however, has been held to be of wider application on the basis of the wider principle of the finality of decisions by courts of law. It would be a mockery of a decision if a decision of a court of competent jurisdiction be treated as nothing by another court having the same jurisdiction over the matter and having identically the same points for consideration. (Hon. Dayal J., in *Munshi v. Chiranji Singh*, C. R. 1093 of 1-50, Alld.).

The rule of *res judicata* is also applicable to *ex parte* orders in execution proceedings where notice has been duly issued and served.

Others Cases.—The rule laid down in S. 11 is applicable in probate proceedings, interlocutory orders in the same suit, insolvency proceedings and also to an application for amendment of a decree when the same has been heard and finally decided.

Res judicata against co-judgment debtors.—A decision of an objection to execution by one of the judgment-debtors of which notice was given only to the decree-holders is not binding on other judgment-debtors.

Issue of law. - Section 11 provides that no court shall try any suit or issue in which the matter directly and substantially in issue has been directly

and substantially in issue in a former suit and so on. Now issues are of three kinds, issues of fact, issues of law and mixed issues of law and fact. An issue of fact may be *res judicata*, and a mixed issue of law and fact may also be *res judicata*. Decision on an issue of law although erroneous operates as *res judicata* if the cause of action in the subsequent suit is also the same as in the previous suit. (*Ganga v. Mahmud-un-nissa Begam*, 1925 A. 761). But there is a conflict of judicial opinion as to whether an erroneous decision on a question of law operates as *res judicata* when the causes of action are different. It has been held in some cases that it does not and in some that it does. The latter view was adopted by a Full Bench of the Calcutta High Court in *Tarini Charan Bhattacharya v. Kedar Nath Halder* (33 Calcutta Weekly Notes, 126). Rankin, C. J., who delivered the leading judgment and with whose views the other learned judges agreed, observed that the question whether a decision is correct or erroneous has no bearing upon the question whether it operates or does not operate as *res judicata*. The doctrine is that in certain circumstances the court shall not try a suit or issue but shall deal with the matter on the footing that it is a matter no longer open to contest by reason of a previous decision. In these circumstances it must necessarily be wrong for a court to try the suit or issue, come to its own conclusions thereon and consider whether the previous decision is right or wrong. It was further observed that S. 11 says nothing about causes of action, nor does the section say anything about point or points of law, or pure points of law. The parties do not join issue upon academic or abstract questions but upon matters of importance to themselves and the section requires that the doctrine be restricted to matters in issue and of these to matters which are directly as well as substantially in issue, and the principle of *res judicata* is not to be ignored merely on the ground that the reasoning, whether in law or otherwise, of the previous decision can be attacked on a particular point.

As regards the effect of decisions by change of law, it was observed in that case :

“The legislature by statute may alter the rights of parties and, when it does so, it makes such provision as it thinks proper to prevent injustice. Courts of law are in no way authorised to alter the rights of parties. They profess, at all events, to ascertain the law, and if the binding character of a decision upon a concrete question as to the terms of a particular holding is to fluctuate with every alteration in the current of authority the Courts will become an instrument for the unsettlement of rights rather than for the ascertainment thereof.”

In *Tarini Charan's* case, therefore, it was, in effect, held that the principle of *res judicata* does not apply when the Legislature alters the law by statute, but courts of law cannot alter the rights of parties. There is no estoppel against statute. (*Woomesh Chandra Maitra v. Barada Das Maitra*, 28 C. 17).

It has definitely been ruled by Courts, apart from *Tarini Charan's* case, that a previous decision does not operate as *res judicata* on the same question when there has been a change of law subsequent to that decision.

Where there is no change of law by the statute, the trend of decision has latterly been to treat the decision on an issue of law as *res judicata*. A decision in a previous suit is binding on the parties even though it proceeded on an

erroneous view of law. (*Narayan v. Gokuldas*, I. L. R. 1946 Nag. 568). Thus decision as to construction of a deed or decree is *res judicata*. But the decision on a question of law in one proceeding does not bar later proceeding except that the right established in favour of one party in the former proceeding cannot be questioned in a subsequent proceeding. Where a decision lays down what the law is and it is found to be erroneous it is not *res judicata* in a subsequent proceeding to recover a different relief. (*Baij Nath Goenka v. Palmanand Singh*, 39 C. 848).

What becomes *res judicata* is the matter which is decided and not the reason which leads the court to decide the matter. (*Province of Bombay v. Ahmedabad Municipality*, 55 Bom. L. R. 670).

Erroneous Decision.—A court empowered by law to try a suit has power to try it rightly or wrongly. A judgment of a court having jurisdiction, however erroneous, cannot be a nullity and will operate as *res judicata*. A decision, however, which is opposed to the provisions of a statute will not operate as *res judicata*. (*Bikan Mahuri v. Mst. Bibi Walian*, 1939 Pat. 653). An erroneous decision on the jurisdiction of another tribunal may be called a decision on a point of law, but unless it is altered in appeal it is *res judicata* as far as parties to that suit are concerned. (*Rameshwar Prasad v. Lal Vijya Singh*, A. I. R. 1951 V. P. 51).

Scope of the principle of *res judicata*.—The scope of the principle of *res judicata* is not confined to what is contained in S. 11 but is of more general application. Again, *res judicata* could be as much applicable to different stages of the same suit as to findings on issues in different suits. If the court which rendered the first decision was competent to entertain the suit or other proceeding, and had therefore competency to decide the issue or matter, the circumstance that it is a tribunal of exclusive jurisdiction or one from whose decision no appeal lay would not by themselves negative the finding on the issue by it being *res judicata* in later proceedings. Where the principle of *res judicata* is invoked in the case of the different stages of proceedings in the same suit the nature of the proceedings, the scope of the enquiry which the adjectival law provides for the decision being reached, as well as the specific provisions made on matters touching such decision are some of the material and relevant factors to be considered before the principle is held applicable.

The doctrine of *res judicata* is not confined to the limits prescribed in S. 11, C. P. C. The underlying principle of that doctrine is that there should be finality in litigation and that a person should not be vexed twice over in respect of the same matter. [*Sri Bhavanarayanaswamivari Temple v. Vedapalli Venkata Bhavanarayana Charyulu*, 1971 (1) S. C. J. 215.]

Interlocutory orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of *res judicata* does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of, the court would be justified in rejecting the same.

as an abuse of the process of court. There are other orders which are also interlocutory but would fall into a different category. If an application made under the provisions of r. 7 of O. 9 (procedure where defendant appears on adjourned date of hearing and assigns good cause for previous non-appearance) is dismissed and an appeal were filed against the decree in the suit in which such applications were made, there can be no doubt that the propriety of the order rejecting the reopening of the proceeding and the refusal to relegate the party to an earlier stage might be canvassed in the appeal and dealt with by the appellate court. In that sense, the refusal of the court to permit the defendant to set the clock back does not attain finally. The principle that repeated applications based on the same fact and seeking the same reliefs might be disallowed by the court does not however necessarily rest on the principle of *res judicata*. Thus if an application for the adjournment of a suit is rejected, a subsequent application for the same purpose even if based on the same facts, is not barred on the application of any rule of *res judicata*, but would be rejected for the same grounds on which the original application was refused. The principle underlying the distinction between the rule of *res judicata* and a rejection on the ground that no new facts have been adduced to justify a different order is vital. If the principle of *res judicata* is applicable to the decision on a particular issue of facts, even if fresh facts were placed before the court, the bar would continue to operate and preclude a fresh investigation of the issue, whereas in the other case, on proof of fresh facts, the court would be competent to make an order conformably to the facts freshly brought before the court.

An order under O. 9, r. 7 does not put an end to the litigation nor does it involve the determination of an issue in controversy in the suit. The Code proceeds upon the view not imparting any finality to the determination of any issue of facts on which the court's action under that provision is based. Thus a decision or direction in an interlocutory proceeding of the type provided for by O. 9, r. 7 is not of the kind which can operate as *res judicata* so as to bar the hearing on the merits of an application under O. 9, r. 13 (setting aside decree *ex parte* against defendant). The latter is a specific statutory remedy provided by the Code for the setting aside of *ex parte* decrees, and it is not without significance that under O. 43, r. 1 (d) an appeal lies not against orders setting aside a decree passed *ex parte* but against orders rejecting such an application, unmistakably pointing to the policy of the Code being that, subject to securing due diligence on the part of the parties to the suit, the Code as far as possible makes provision for decisions in suits after a hearing afforded to the parties. (*Arjun Singh v. Mahindra Kumar*, A. I. R. 1964 S. C. 993).

Avoidance of Res judicata.—The provisions of S. 11 are mandatory, and the ordinary litigant who claims under one of the parties to the former suit can only avoid its provisions by taking advantage of S. 44 of the Evidence Act which defines with precision the grounds of such avoidance. They are fraud and collusion. A judgment obtained by fraud or collusion does not operate as *res judicata*. (*Parbati v. Gajraj Singh*, 1936 A. L. J. 1162). So is also a judgment of a court not competent to decide it. A void decree cannot operate as *res judicata*.

It is not competent for the court in the case of the same question arising between the same parties to review a previous decision, no longer open to

appeal, given by another court having jurisdiction to try the second case. If the decision was wrong it ought to have been appealed from in due time. The parties interested in the matter cannot be allowed to say that the value or the subject-matter on which the former decision was pronounced was comparatively so trifling that it was not worth their while to appeal from it. The importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute.

Res Judicata and Estoppel distinguished.—*Res judicata* corresponds to that part of the doctrine of estoppel which is known in English Law as estoppel by record. Estoppel as enunciated in S. 115 of the Indian Evidence Act is by conduct or agreement or estoppel *in pais*. Thus even though *res judicata* may be said to be included in the doctrine of estoppel, as understood in the wider sense of the term, it must be distinguished from estoppel, as distinctly provided for in the Indian Law of Evidence.

The doctrine of *res judicata* can be distinguished from estoppel as generally understood, on the following grounds :

The rule of *res judicata* is based on policy, *i. e.*, it is to the interest of the State that there should be an end to litigation, and belongs to the province of procedure. Estoppel on the other hand, is part of the law of evidence and proceeds on the equitable principle of altered situation, *viz.*, that he who, by his conduct, has induced another to alter his position to his disadvantage, cannot turn round and take advantage of such alteration of the other's position.

Res judicata precludes a man from avowing the same thing in successive litigations, while estoppel prevents a party from saying two contradictory things at different times.

Res judicata is reciprocal and mutual and binds both the parties, while estoppel binds the party who made the previous statement or showed the previous conduct.

Res judicata, as observed by Mahmud, J. in *Sita Ram v. Amir Begam*, 8 Allahabad, 324, prohibits the court from entering into an inquiry at all as to a matter already adjudicated upon ; estoppel prohibits a party, after the inquiry had already been entered upon, from proving anything which would contradict his own previous declarations or acts to the prejudice of another party who, relying upon these declarations or acts, has altered his position. In other words, *res judicata* prohibits an inquiry *in limine*, and bars the trial of a suit while estoppel is only a piece of evidence and emphasises that a man should not be allowed to retrace the steps already walked over.

Res judicata ousts the jurisdiction of the court to try the case, while estoppel shuts the mouth of a party, being a rule of evidence.

The doctrine of *res judicata* results from a decision of the court, while estoppel results from the acts of the parties themselves.

Lastly, the theory of *res judicata* is to presume conclusively the truth of the former decision while the rule of estoppel prevents a person from setting up what he calls the truth,

Res Judicata and lis pendens.—Where a conflict arises between the doctrine of *res judicata* and that of *lis pendens* in any case the former will prevail over the latter. (*Digambarrao v. Rangrao*, A. I. R. 1949 Bom. 367).

12. Bar to further suit.—Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

The rules that bar a fresh suit in respect of the same cause of action are as follows :

O. 2, r. 2—Omission to sue in respect of part of a claim.

O. 9, r. 2—Decree against plaintiff by default bars a fresh suit.

O. 22, r. 9—Abatement of suit or its dismissal under O. 22 bars a fresh suit.

O. 23, r. 1—Withdrawal of a suit or abandonment of part of claim without leave of court bars a fresh suit.

Foreign judgment.—Foreign judgment has been defined earlier as meaning the judgment of a Court situate outside India and not established or continued by the authority of the Central Government.

13. When foreign judgment not conclusive.—A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

- (a) where it has not been pronounced by a court of competent jurisdiction ;
- (b) where it has not been given on the merits of the case ;
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable ;
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice ;
- (e) where it has been obtained by fraud ;
- (f) where it sustains a claim founded on a breach of any law in force in India.

Under S. 13 (a) of the Code of Civil Procedure a foreign judgment is conclusive as to any matter thereby directly adjudicated upon except “where

it has not been pronounced by a court of competent jurisdiction." That the validity of the judgment is questioned in a criminal court and not in a civil court is not necessary for consideration. If the judgment falls under any of the cls. (a) to (e) of S. 13, it will cease to be conclusive as to any matter thereby adjudicated upon. The judgment will then be open to a collateral attack on the grounds mentioned in the five clauses of S. 13. [*Smt. Satya v. Feja Singh*, 1975 (II) S. C. J. 294].

Section 13 (f), C. P. C., does not require that the procedure of the foreign court should be identical with or even similar to the procedure of the Courts in this country. That section again does not say that any irregularities in the procedure prescribed for the foreign court by the laws of that State to which it belongs, would invalidate its decision. The legal basis of the claim in the foreign court must involve a breach of the laws in force here ; it is that which is dealt with in clause (f) and not variations in the procedure of the foreign court from the procedure in force here.

The expression "foreign judgment" under S. 13 of the Code must be understood to mean "an adjudication by a foreign court upon the matter before it."

It is for a foreign court to interpret its own law and rules of procedure and its decision that a particular court was the 'proper' court must be regarded as conclusive. (*Brijlal Ramjidas v. Govindram Gordhan las Se' saria*, 1947 A.L.J. 578, P. C.).

The plaintiff filed a suit in the Indian court and another in a foreign court and obtained a decree in the foreign court. It was held by the Calcutta High Court that (i) the cause of action did not merge in the foreign judgment and the foreign judgment did not make the suit in the Indian court incompetent. A suit on a cause of action remains competent in a domestic tribunal even though a judgment has been based on it by a foreign court ; (ii) the fact that the foreign judgment allowed payment in instalments and some instalments had been deposited in court did not operate as a bar to the suit. The principle on which a foreign judgment which has been satisfied prevents the suit on the original cause of action being brought in the domestic tribunal is that no one can be allowed to approbate and reprobate ; (iii) section 13, C. P. C., did not bar the suit. What S. 13 means is that no domestic court can come to a different finding with regard to the matter and is not meant to operate as a bar *in limine*. (*Setabganj Sugar Mills Ltd. v. Benozir Ahmad*, A. I. R. 1952 Cal. 116).

A State is not bound under the law of nations to enforce within its territories the judgment of a foreign tribunal. (*Clark v. Fisherton Angar*, 6 Q. B. 139). But in England and in countries where the English system of jurisprudence prevails, such a judgment is enforced on the principle that where a court of competent jurisdiction has adjudicated that a certain sum is due from one person to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment can be maintained. This is the principle on which S. 13 is based.

The section enacts a rule of *res judicata* in the case of foreign judgments, except in the six circumstances mentioned above. In other words, a foreign judgment is conclusive as to any matter directly adjudicated upon, except under the above six conditions, provided all the other conditions of S. 11 are satisfied.

Court of competent jurisdiction.—Competency is to be determined according to the principles of international law and not according to the law of the foreign court.

Rules as to competent jurisdiction.—In Dicey the rules as to competent jurisdiction has been stated to be as follows :

“In an action *in personam* in respect of any cause of action, the courts of a foreign country have jurisdiction in the following cases :—

First case.—Where at the time of the commencement of the action the defendant was resident or present in such country, so as to have the benefit, and be under the protection of the laws thereof.

Second case.—Where the defendant is, at the time of the judgment in the action, a subject or citizen of such country.

Third case.—Where the party objecting to the jurisdiction of the courts of such country has, by his own conduct, submitted to such jurisdiction, *i. e.* has precluded himself from objecting thereto—

- (a) by appearing as plaintiff in the action or counter-claiming ; or
- (b) by voluntarily appearing as defendant in such action ; or
- (c) by having expressly or impliedly contracted to submit to the jurisdiction of such courts.”

The above rule has stood for a considerable length of time and is more or less a settled position even so far as India is concerned. (*Raghunath Prasad v. Girish Chandar*, 1955 A. L. J. 539).

The judgment has to be of a “competent court”, that is, a court having jurisdiction over the parties and the subject-matter. Even a judgment *in rem* is open to attack on the ground that the Court which gave it had no jurisdiction to do so. [*Smt. Satya v. Feja Singh*, 1975 (II) S. C. J. 294].

Conclusiveness of foreign judgment and court of competent jurisdiction.—A foreign judgment is made by S. 13 conclusive between the parties as to any matter directly adjudicated and it is not predicated of the judgment that it must be delivered before the suit in which it is set up was instituted. Section 13 incorporates a branch of the principle of *res judicata*, and extends it within certain limits to judgments of foreign courts if competent in an international sense to decide the dispute between the parties. The rule of *res judicata* applies to all adjudications in a “former suit” which expression by Explanation I to S. 11 denotes a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto. This explanation is merely declaratory of the law.

A judgment of a foreign Court to be conclusive between parties must be a judgment pronounced by a Court of competent jurisdiction ; and competent contemplated by S. 13 is in an international sense, and not merely by the law of the foreign State in which the court delivering judgment functions.

Undoubtedly, a Court of a foreign country has jurisdiction to deliver judgment *in rem* which may be enforced or recognised in an Indian Court,

provided that the subject-matter of the action is property whether movable or immovable within the foreign country. It is also well settled that a Court of a foreign country has no jurisdiction to deliver a judgment capable of enforcement or recognition in another country in any proceeding the subject-matter of which is title to immovable property outside that country. But there is no general rule of private international law that a court can in no event exercise jurisdiction in relation to persons, matters or property outside jurisdiction. The courts of a country generally impose a three-fold restriction upon the exercise of their jurisdiction: (1) jurisdiction *in rem* (binding not only the parties but the world at large) by a court over *res* outside the jurisdiction will not be exercised, because it will not be recognised by other courts; (2) the court will not deal directly or indirectly with title to immovable property outside the jurisdiction of the State from which it derives its authority; and (3) the Court will not assist in the enforcement within its jurisdiction of foreign penal or revenue laws.

An action *in personam* lies normally where the defendant is personally within the jurisdiction or submits to the jurisdiction or though outside the jurisdiction may be reached by an order of the court. In an action *in personam* the court has jurisdiction to make an order for delivery of movables where the parties submit to the jurisdiction. A person who institutes a suit in a foreign court and claims a decree *in personam* cannot, after the judgment is pronounced against him, say that the court had no jurisdiction which he invoked and which the court exercised, for it is well recognised that a party who is present within or who had submitted to jurisdiction cannot afterwards question it. (*Viswanathan v. Abdul Wajid*, A. I. R. 1963 S. C. 1).

Absence of decision on merits.—In order to be conclusive the foreign judgment must be on the merits. A decision on the merits involves the application of the mind of the court to the truth or falsity of the plaintiff's case and a judgment passed after a judicial consideration of the matter by taking evidence may be a decision on the merits even though passed *ex parte*. A judgment given in a case in which the defendant puts in no appearance, no evidence is called or considered and in which judgment is given by default by way of summary procedure is not a judgment "on the merits". A judgment of a foreign court on compromise is a judgment on merits and must be held to be conclusive. (*Satya Narain v. Balchand*, I. L. R. (1954) 4 Raj. 905).

Notwithstanding the definition of judgment in S. 2, C. P. C., the expression 'foreign judgment' in S. 13 must be understood to mean an adjudication by a foreign court upon the matter before it.

There is nothing in S. 13 to support a contention that every step in the reasoning which led the foreign court to its conclusion must have been 'directly adjudicated upon'. 'Directly' does not mean 'expressly'. Hence where the 'matter' which was 'directly adjudicated upon' by the foreign court was the validity of an award and the order of the court in effect was that the award had been properly filed and that the objections to it must be dismissed, that order is a 'judgment' within S. 13, C. P. C., which is conclusive between parties as to the validity of the award.

The expression 'foreign judgment' in S. 13 means an adjudication by a foreign court upon the matter before it and not a statement of a foreign judge of the reasons for his order. To hold otherwise would have the effect

235 (5) 2 = Accumulation
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= 235-5. = 235-7

of making S. 13 inapplicable to an order where no reasons are given. What is conclusive under S. 13 is the judgment, *i. e.*, the final adjudication and not the reasons.

The question whether a foreign court is the 'proper court' to deal with a particular matter according to the law of the foreign country is a question for the courts of that country. Hence where a foreign court of final authority decides that a particular court is a 'proper court' its decision must be regarded as conclusive for purposes of S. 13 (a). (*Brijlal Ramjidas v. Govindram Gordhandas Seksaria*, A. I. R. 1947 P. C. 192).

Fraud.—Under S. 13 (e), Civil Procedure Code, the foreign judgment is open to challenge "where it has been obtained by fraud." It is wrong to think that judgments *in rem* are inviolable. Fraud, in any case bearing on jurisdictional facts, vitiates all judicial acts whether *in rem* or *in personam*. (*Smt. Satya v. Teja Singh*, 1975 II S. C. J., 294).

Mistake of law.—A mistake of law in a foreign judgment is no ground for vacating it.

Natural justice.—There must be something in the procedure anterior to the judgment which is repugnant to natural justice when the foreign judgment shall not be conclusive. Such cases may arise where a decree is pronounced in the absence of a party, where a guardian *ad litem* of a minor is not appointed or where the legal representatives of a deceased defendant are not brought on the record. But the mere fact that the foreign court did not follow the procedure of Indian courts or did not observe the Indian rules of evidence will not invalidate a foreign judgment on the ground of proceedings being opposed to natural justice.

Above all this in order to obtain territorial validity of a foreign judgment at least one of the following conditions must be satisfied, *viz.*, (1) the defendant should be a subject of the foreign country; (2) the defendant was resident in the foreign country at the time when the action was begun against him; (3) the defendant was served with process while temporarily present in the foreign country; (4) the defendant in his character as plaintiff in the foreign action himself selected the forum where the judgment was given against him; (5) the defendant voluntarily appeared; or (6) the defendant had contracted to submit to the jurisdiction of the foreign court. (*Mallappa Yellappa v. Raghavendra Shamrao*, I. L. R. 1938 Bom. 16).

Section 44-A. Execution of a foreign judgment.—Foreign judgments may be enforced by suit. They may also be enforced by the proceedings in execution in certain specified cases, which are mentioned in S. 44-A. That section provides that where a certified copy of a decree of any of the superior Courts of the United Kingdom or any reciprocating territory has been filed in a district court, the decree may be executed in India as if it had been passed by the district court on the filing of a certified copy of the decree together with a certificate from such superior court stating the extent, if any, to which the decree has been satisfied or adjusted, which certificate shall be conclusive proof of the extent of satisfaction or adjustment. Only in such cases a foreign judgment can be enforced by proceedings in execution. Section 44-A is intended to be part of a reciprocal arrangement under which on the one hand decrees of Indian courts should be executable in the United Kingdom and any other reciprocating territory and on the other hand decrees of Courts in the

United Kingdom and other notified areas should be executable in India. Reciprocity of treatment between nations is the real basis, and the obligation arises from international dealings. Otherwise a foreign judgment can only be enforced by a suit upon the judgment and a regular suit has to be brought for the relief which has been granted by the foreign judgment.

Decrees of courts in Pakistan.—Pakistan has not been declared to be a reciprocating territory within the meaning of S. 44-A of the Code and as such decrees passed, after the 14th of August, 1947, by the courts in Pakistan cannot be executed by courts in India. Even in a case where a decree was passed before the 15th August, 1947, by a court which subsequently is situate in Pakistan and was transferred for execution to the court of small causes at Calcutta, the Calcutta High Court held that the court of small causes at Calcutta had no jurisdiction to entertain the application for execution. From after the 15th August, 1947, the court which passed the decree under execution became in relation to that court a 'foreign court' and the judgment, on the basis of which the decree was passed, was a foreign judgment. Accordingly the requirements of S. 13 had to be complied with, unless the judgment was by a court situate within the territories of a reciprocating country as under S. 44-A of the Code. (*Dominion of India v. Hiralal Bathra*, 53 C. W. N. 817). The Indian Independence Pakistan Courts (Pending Proceedings) Act, (IX of 1952), declares certain decrees passed by Courts in Pakistan against a Government in India to be ineffective and provides for an alternative remedy by way of institution of a fresh suit.

A decree of Lahore court was transferred to the court of the District Judge at Delhi and the execution proceedings were dismissed in default. It was held that when a later application for execution was made in Delhi court on the 15th April, 1948, that court had ceased to have jurisdiction to deal with the case by reason of the partition of the country into India and Pakistan. The Lahore court had become a foreign court in relation to the courts at Delhi and Pakistan was not a reciprocating territory for the purposes of S. 44-A and the courts at Delhi had no jurisdiction to execute the decree save as expressly provided by Art. 4, Indian Independence (Legal Proceedings) Order, 1947. The proceedings initiated for the first time on the 15th April, 1948, could not be said to be pending immediately before the appointed day and so Art. 4(1), Indian Independence (Legal Proceedings) Order, 1947, had no application. (*Said-ul-Hamid v. The Federal Assurance Co., Ltd. New Delhi*, I. L. R. 1951 Punj. 111).

Period of limitation.—The period of limitation for filing a suit on a foreign judgment is three years from the date of the judgment. (Art. 101 of the Indian Limitation Act, 1963).

14. Presumption as to foreign judgments.—The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record ; but such presumption may be displaced by proving want of jurisdiction.

PROCEDURE IN SUITS BEFORE HEARING

Place of Suing (Ss. 15—20)

Sections 15 to 20 of the Code of Civil Procedure lay down the rules prescribing the forum or venue for the institution of civil suits in India. They are as under :

15. Court in which suits to be instituted.—Every suit shall be instituted in the Court of the lowest grade competent to try it.

The object of this provision by requiring a suitor to bring his suit in the court of the lowest grade competent to try it is that courts of higher grades may not be overcrowded with suits. At the same time it does not oust the jurisdiction of the courts of higher grades, but the higher grade court should return the plaint in such case to the plaintiff to be presented to the court of the lowest grade competent to try it.

The section lays down a rule of procedure and not of jurisdiction. Exercise of jurisdiction by a court of higher grade than is competent to try it is a mere irregularity, but exercise of jurisdiction by a court of lower grade than is competent to try it is a nullity and the decree will be set aside. Consent of parties cannot confer jurisdiction.

Over-valuation and under-valuation.—Although jurisdiction is determined *prima facie* by the value put by the plaintiff on his suit, he is not at liberty to give any arbitrary valuation and institute the suit in the court of his own choice. If the over-valuation or under-valuation is patent on the face of the plaint the court shall on discovery return it to the plaintiff to be presented to the proper court under O. 7, r. 10. The over-valuation or under-valuation of the suit does not afford a ground for having the decree set aside unless objection as to over-valuation or under-valuation was taken by the defendant in the court of first instance at or before the framing of the issues and the over-valuation or under-valuation has, in the opinion of the appellate court, prejudicially affected the disposal of the case on the merits.

16. Suits to be instituted where subject-matter situate.—Subject to the pecuniary or other limitations prescribed by any law, suits—

- (a) for the recovery of immovable property with or without rent or profits,
- (b) for the partition of immovable property,
- (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,
- (d) for the determination of any other right to or interest in immovable property,
- (e) for compensation for wrong to immovable property,
- (f) for the recovery of movable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate ;

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation.—In this section “property” means property situate in India.

Suits regarding immovable property are to be instituted in the court within whose local jurisdiction the property is situate. The proviso to S. 16, however, provides that where a suit to obtain relief in respect of immovable property can be entirely obtained through the personal obedience of the defendant, the suit may be instituted either within the local limits of the court where the property is situate, or in the court within whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Equity acts in personam.—The proviso to the section is an application in a modified form of a maxim of Equity, *viz.*, “Equity acts in personam.” In England the Chancery Courts had and now the Chancery Division of the High Court of Justice has jurisdiction to entertain certain suits respecting immovable property, though the property might be situate abroad if the relief sought could be obtained through the personal obedience of the defendant. The personal obedience of the defendant could be secured only if the defendant resided within the local limits of the jurisdiction of the court or carried on business within those limits. Its essential feature was that the land in respect of which the suit was brought was situate abroad, but the person of the defendant or his personal property was within the jurisdiction of the court in which the suit was brought. The land being situate abroad the decree could not be executed against the land, but the person or personal property of the defendant being within the jurisdiction of the court the decree could be executed in person.

A suit merely for the recovery of rent from a lessee of immovable property cannot be said to be a suit “for the determination of any other right to or interest in immovable property”, under cl. (d) and therefore is not covered by S. 16, C. P. C. (*Har Dayal Singh v. Ram Ujagar Dube*, 1954 A.L.J. 742).

17. Suits for immovable property situate within jurisdiction of different Courts.—Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate :

Provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such Court.

A suit to obtain relief respecting, or compensation for wrong to, immovable property which is situate within the jurisdiction of different courts

may be instituted in any court within the local limits of whose jurisdiction any portion of the property is situate, provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such court.

The object of the section is to avoid multiplicity of suits, but the section is no bar to parties bringing successive suits where the parties are situate in different jurisdictions.

18. Place of institution of suit where local limits of jurisdiction of Court are uncertain --(1) Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immovable property is situate, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction :

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

(2) Where a statement has not been recorded under subsection (1), and an objection is taken before an appellate or revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the appellate or revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice.

Where it is uncertain as to within whose jurisdiction of two or more Courts the immovable property is situate any one of those Courts may try the suit relating to that property after recording a statement as to uncertainty.

19. Suits for compensation for wrongs to person or movables.--Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.

Illustrations

(a) *A*, residing in Delhi, beats *B* in Calcutta. *B* may sue *A* either in Calcutta or in Delhi.

(b) *A*, residing in Delhi, publishes in Calcutta statements defamatory of *B*. *B* may sue *A* either in Calcutta or in Delhi.

A suit for compensation for wrong done to the person or to movable property may be instituted, at the option of the plaintiff, either in the court within whose jurisdiction the wrong was done or alternatively in the court within whose jurisdiction the defendant resides, or carries on business, or personally works for gain.

20. Other suits to be instituted where defendants reside or cause of action arises.—Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

- (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain ; or
- (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution ; or
- (c) the cause of action, wholly or in part, arises.

Explanation.—A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Illustrations

(a) *A* is a tradesman in Calcutta. *B* carries on business in Delhi. *B*, by his agent in Calcutta, buys goods of *A* and requests *A* to deliver them to the East Indian Railway Company. *A* delivers the goods accordingly in Calcutta. *A* may sue *B* for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where *B* carries on business.

(b) *A* resides at Simla, *B* at Calcutta and *C* at Delhi. *A*, *B* and *C* being together at Varanasi, *B* and *C* make a joint promissory note payable on demand, and deliver it to *A*. *A* may sue *B* and *C* at Varanasi, where the cause of action arose. He may also sue them at Calcutta, where *B* resides, or at Delhi, where *C* resides ; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the Court.

It is apparent from the above that foreigners are not exempt from the jurisdiction of Indian Courts.

The plaintiff sent his watch for repairs to the defendant in Bombay, asking the defendant to send an estimate of repairs. When the parcel was opened, according to the defendant, he found nothing in it. The plaintiff brought the suit for recovery of the price of the watch and damages at Ujjain where he resided. It was held that the cause of action whether in contract or tort arose entirely in Bombay and the Ujjain court had no jurisdiction. Where an order for work is sent by post and without formal acceptance the work is carried out in the district where the order is received, the whole cause of action arises in the latter district. In so far as the suit was one in tort, S. 19, C.P.C., applied and as the wrong to the watch was done at Bombay where the defendant carried on business, the Ujjain court had no jurisdiction. (*Dalpatrai v. West End Watch Co.*, A. I. R. 1953 M. B. 38).

Cause of action.—“Cause of action” means the cause or the set of circumstances which leads up to a suit. It may compendiously be defined as being the fact or facts which establish or give rise to a right of action or the existence of which entitles a party to seek redress in a court of law. The term connotes all congeries of facts which it is necessary for the plaintiff to prove, if traversed, in order to entitle him to a decree in the suit. It does not, however, comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved to entitle the plaintiff to a decree. It is, in other words, a bundle of essential facts, which it is necessary for the plaintiff to prove before he can succeed in the suit. It is the media upon which the plaintiff asks the court to arrive at a conclusion in his favour but has no reference to the relief claimed or the defence set up. In its restricted sense, it means the immediate occasion for the action. Where the cause of action is fraud, discovery of fraud is no part of the cause of action. The cause of action must be antecedent to the institution of the suit, and no cause of action can be founded on any allegations made in the proceedings. Every plaint must disclose a cause of action when alone the court will be able to proceed to a determination of the dispute.

Suits on contract.—In suits arising out of contract the cause of action arises at the place where the contract was made, the place where the contract was to be performed or performance completed or at the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable, and the suit can be filed at any of the three places.

Suits for damages for breach of contract.—In a suit for damages for breach of contract the cause of action consists of the making of the contract and of its breach and the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. Where no place of performance is prescribed by the agreement, the place where it is intended by the parties that such contract should be performed ought to supply the forum.

Contract of Sale.—A suit on account of non-delivery of goods may be brought in a court of the place where delivery and payment were to be made. Where the contract is by correspondence the place where acceptance

is signified is the forum. A contract by correspondence is made at the place where the letter of acceptance is posted; and if acceptance is by performance of a condition, the suit may be instituted at the place where the condition is performed. The cause of action for a suit by the seller for balance of accounts due from the buyer arises at the place of consignment of the goods to the railway.

The performance of a contract is part of the cause of action and a suit in respect of its breach can be filed at the place where the contract should have been performed or its performance completed. Thus in a contract for sale of goods, the suit may be filed at the place where the goods are deliverable or the price payable. (*Sheo Charan v. Taj Bhai*, 1917, 39 All. 368). Where a buyer at Kasganj ordered dyes from a seller at Delhi, but after paying for and opening the parcel found it to contain only clay, he was entitled to sue for damages at Kasganj. [*Ram Lal v. Bhola Nath*, (1920) 42 All. 629].

Carrier.—A suit for refund of freight for damages for short delivery and for general average account should be filed where the freight was collected or where the goods were delivered.

Partnership suits.—A suit for account of a dissolved partnership may be instituted either where the contract of partnership was entered into or where the business of partnership was carried on. Where partnership business was carried on at two places a suit for dissolution can be filed at either place and also at the place where partnership accounts are maintained. A suit for dissolution of partnership carried on in a foreign territory is maintainable in India if the parties are resident there.

Principal and Agent.—The proper forum in the case of an ordinary agent is the place where the contract of agency was made or the place where accounts are to be rendered and payment is to be made by the agent.

A suit against a commission agent lies at the place where the commission agent carries on business. (*Firm Brij Raj & Co. v. Firm Saagarmal Dhan Raj*, A. I. R. 1952 Punj. 119). A suit on commission agency contract can be filed at the place where it was made.

Pakka Arahatiyas or commission agents are to be sued where they carry on business in the absence of a contract to the contrary.

Where no place for rendering accounts is specified, it is to be ascertained from the intention of the parties.

Debtor and Creditor.—Where a place is fixed for payment of debt, the court of that place will have jurisdiction. In the absence of any stipulation a suit to recover the money borrowed may be brought at the place where the lender resides. Ordinarily the borrower should seek the creditor.

Suit on Negotiable Instruments.—A suit on a promissory note lies at the place where it is drawn, signed and dated. The common rule that the debtor must seek his creditor does not apply to promissory notes. A suit on pronote lies at the maker's place.

Where no cash was advanced and the loan was by way of cheque, the place where the defendant got the cheque from the plaintiff gives rise to a part of the cause of action and the plaintiff can file the suit for recovery of

the loan in the court of that place. (*Ladli Parshad v. Chandiok*, A. I. R. 1952 Pep. 4).

Suit for damages for libel or defamation.—A suit for damages for libel or defamation may be brought either in the court of the place where the publication takes place or where the defendant resides. In the case of a publication in a newspaper, the libel is published wherever the paper is read.

Mesne profits.—A suit for mesne profits is a suit for profit or benefit arising out of immovable property and the suit is governed by S. 15 of the Code of Civil Procedure. It can, therefore, be instituted in the court within whose jurisdiction the property is situate or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Sale of immovable property.—A suit for specific performance of a contract of sale of immovable property is governed by S. 16 of the Code of Civil Procedure and can be instituted in the court within whose jurisdiction the property is situate or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Suit for standing trees.—Trees standing on land are immovable property and therefore the suit must be instituted in the court within whose local jurisdiction the land is situate, unless the relief can be entirely obtained through the personal obedience of the defendant when it can be brought either in the court within whose jurisdiction the property is situate or in the court within whose jurisdiction the defendant resides or carries on business or personally works for gain.

Husband and wife.—The cause of action in a suit for restitution of conjugal rights is the breach of marital obligation on the part of either party. The suit may be brought either where the husband or the wife resides, but if the wife has never lived at the husband's house the suit must be brought in the court of the place where the wife resides.

A suit for breach of contract of betrothal has to be filed where the breach took place. A suit for dower lies in a court within whose jurisdiction the marriage and divorce took place.

Suit on torts.—A suit for a tort may be brought either where the wrong was committed or where the tortfeasor resides or carries on business.

Copyright.—A suit for infringement of copyright lies in the place where the defendant resides or the infringement of copyright has taken place.

Infringement of Trade Mark.—A suit for damages for infringement of a trade mark may be brought in the court of the place where the defendant resides or in the court of the place where the defendant publishes advertisements constituting infringement of the trade mark.

Suit for malicious prosecution.—In a suit for malicious prosecution and arrest the cause of action arises at the place where the person is arrested.

Custody of ward.—A suit by a guardian for the custody of his ward may be brought in the court of the place from where the ward was removed or at the place to which the ward was removed.

Corporation.—A corporation is deemed to carry on business at its sole or principal office in India or in respect of any cause of action arising at any place where it has also a subordinate office, at such place. The suit can, therefore, be brought at the principal place of business, generally the registered office, or, where there are subordinate or branch offices, the suit can be brought in the court where the subordinate office is situate *in respect of a cause of action arising there*. Where neither of the two conditions are satisfied and the company changed its office from Lahore to Delhi, the court at Delhi has no jurisdiction to try the suit against the company. (*Home Insurance Co., Ltd. v. Jagatjit Sugar Mills Co.*, A. I. R. 1952 Punj. 142).

Insurance Contract.—In case of agents who are merely authorised to take proposals and pass on to the head office of the insurance company, no cause of action arises at the place where the agent gets the proposals. The offer and acceptance are made only at the place of the head office, where accrues the cause of action.

In the case of an insurance policy payable at death the place of the death of the assured is a place where the cause of action arises and gives jurisdiction to the court of that place. In the case of a suit on a fire or burglary insurance, a part of the cause of action arises at the place where the fire occurs or at the place where the burglary takes place.

21. Objections to jurisdiction.—(1) No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

(2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any appellate or revisional court unless such objection was taken in the court of first instance at the earliest possible opportunity, and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(3) No objection as to the competence of the executing court with reference to the local limits of its jurisdiction shall be allowed by any appellate or revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity and unless there has been a consequent failure of justice.

Pleas as to lack of jurisdiction.—New plea as to lack of jurisdiction of civil court can be raised at any stage of the proceedings as it goes to the root of the matter and therefore it can be raised at any stage. Moreover, the decision of this question does not require any investigation into the facts. (*Mohan Lal v. Ratna*, A. I. R. 1971 Rajasthan, 167).

The judgment of a court without inherent jurisdiction, however precisely certain and technically correct, is a nullity. Section 21 is an exception to the

above rule and effects to cure for all purposes defects due to want of territorial jurisdiction, except under the conditions specified in it. In other words, S. 21 makes it clear that non-compliance with the provisions of Ss. 15 to 21 does not render the decree a nullity if objection as to the place of suing has not been taken at the proper time. This section, however, does not cure want of jurisdiction over the subject-matter. Nor does it apply to cases of want of pecuniary jurisdiction or of exclusive jurisdiction.

All conditions mentioned in the section must be fulfilled before the decree can be set aside, *viz.*, the objection as to place of suing must be taken at the earliest opportunity in the court of first instance and in cases where issues are settled at or before settlement of issues. Even then the court of appeal or revision will not allow the objection unless there has been a failure of justice. The question of territorial jurisdiction cannot be raised in the executing court.

Objection regarding territorial jurisdiction does not go to root of jurisdiction.—It is well settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like S. 21 of the Code of Civil Procedure.

The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seizin of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it. (*Hira Lal Patni v. Kali Nath*, A. I. R. 1962 S. C. 199).

Section 21 is a rule of prudence as well as a rule of guidance. If, by an act of omission or commission, the defendant having raised the plea as to jurisdiction does not even ask for trial of the issue on such jurisdiction as a preliminary issue, and allows the trial to go on in the usual course on all the issues, he should be deemed in such circumstance to have waived his objection as to jurisdiction. (*M/s. Nanak Chand Shadurain v. The Tinnelvely-Tuticorin Electric Supply Co. Ltd.*, A. I. R., 1975 Mad. 103).

Lack of Jurisdiction and Irregular Exercise of jurisdiction.—A marked distinction exists between cases in which Courts lack jurisdiction to try them and where jurisdiction is irregularly exercised by Courts. In the former case the Court ought not to have entered upon trial of the suit ; in the latter it could have avoided that, but necessarily not. Competency of a Court to try an action goes to the root of the matter and when such competence is not found, it has no jurisdiction at all to try the case. But objection based on irregular exercise of jurisdiction is a matter which parties can waive. Equally well settled is the proposition that where there are two or more competent Courts which can entertain a suit parties to the concerned transaction can contract to vest jurisdiction in one of such Courts to try disputes. If such a contract is clear, unambiguous, not vague and explicit, it is not hit by S. 28 of the Contract Act. This should not be understood as parties contracting against statute. But this is one of many series of contracts available in mercantile practice and forged in the name of commercial expediency.

However, invariably, the whole question resolves itself into one of fact. If the parties at the inception applied their mind and choose one of the competent Courts as the Court in which disputes have to be adjudicated and decided upon, and if such a consensus is demonstrable in a given case, Courts ought not to be astute to find a different contract between the parties. (*M/s. Nanak Chand Shadurian v. The Tinnelvally-Tuticorin Electric Supply Co. Ltd.*, A. I. R. 1975 Mad. 103).

21-A. Bar on suit to set aside decree on objection as to place of suing.—No suit shall lie challenging the validity of a decree passed in a former suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, on any ground based on an objection as to the place of suing.

Explanation.—The expression “former suit” means a suit which has been decided prior to the decision in the suit in which the validity of the decree is questioned, whether or not the previously decided suit was instituted prior to the suit in which the validity of such decree is questioned.

Transfer of Suits

(Sections 22—25)

22. Power to transfer suits which may be instituted in more than one Court.—Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed.

Ordinarily, the plaintiff has the right to choose the forum where he has the choice of two or more courts in which he may properly institute a suit. But the defendant may apply in such cases to have the suit transferred from the court in which it is filed to another court, which has also the jurisdiction to hear the suit. This the defendant has to do after notice to the other parties at the earliest possible opportunity and in all cases where issues are settled at or before such settlement.

23. To what Court application lies.—(1) Where the several Courts having jurisdiction are subordinate to the same appellate Court, an application under section 22 shall be made to the appellate Court.

(2) Where such Courts are subordinate to different appellate Courts but to the same High Court, the application shall be made to the said High Court.

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.

The above application under S. 22 is to be made to the appellate court where the several courts having jurisdiction are under the same court of appeal or to the High Court where the several courts are under the same High Court though under different appellate courts or to the High Court within the local limits of whose jurisdiction the court in which the suit is brought is situate where such courts are subordinate to different High Courts.

24. General power of transfer and withdrawal.—(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage—

- (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or
- (b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and—
 - (i) try or dispose of the same ; or
 - (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same ; or
 - (iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which is thereafter to try or dispose of such suit or proceeding may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section, (a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court ; (b) “proceeding” includes a proceeding for the execution of a decree or order.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it.

Apart from other provisions, there is the general power of transfer and withdrawal vested in the High Court or the District Court, which on the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, can (1) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same, or (2) withdraw any suit, appeal or other proceeding pending in any court subordinate to it, and try or dispose of the same, or transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same, or re-transfer the same for trial or disposal to the court from which it was withdrawn.

Convenience of parties is to be regarded as a sufficient ground for taking action under S. 24, particularly when parties are required to approach specific different forums. (*Lolbai Narain v. Shivji Ramji*, A.I.R. 1953 Kutch, 45). Where both suits raise common defence and issues the case should be transferred to the same court. (*Abdul Hasan v. Umarlal*, 1953 N. L. J. Sh. No. 108).

Section 23 merely lays down the forum in which applications under S. 22 are to be made. Section 23 is not an independent section. It is supplement to S. 22. Section 24 is a general provision empowering the High Court or the District Court to transfer a case on the motion of any other party or on its own motion. The general power conferred by S. 24 is not to be applied where the case falls under S. 22. If S. 24 were to apply to the classes of cases covered by S. 22, it would not have been necessary for the legislature to enact S. 22 at all. If an application is made for transfer of a suit from one district to another on the ground which is covered by S. 22, C. P. C., it falls under that section and not under S. 24 and if the provisions of S. 22 are not complied with by the applicant the application is not maintainable. (*Dr. Rajnath v. L. Vidya Ram*, 1953 A. L. J. 437).

Under S. 24 of the Code of Civil Procedure the exercise of jurisdiction in the matter of transfer of a suit, appeal or proceeding by the High Court or the District Court is not dependent on or controlled by an application being moved by any of the parties and the power of transfer can be exercised by the High Court or the District Judge even without any such application being moved on his own motion *suo motu*: See *Rajah Sir Annamalai Chettiar v. S. Ram Ramanathan Chettiar*, A. I. R. 1936 Mad. 55; *Babubhai Vamalchand Kachra v. Hiralal Vamalchand Kachra*, A. I. R. 1941 Bombay 69; and *Bisandayal Sitaram v. Bodulal Ladhuram*, A. I. R. 1916 Nagpur 123. (*Madan Mohan Saran v. Vidyadhar Govind Oak*, 1974 A. L. J. 653).

The Code of Civil Procedure (Amendment) Act has added sub-section (5) which provides that a suit or proceeding may be transferred under this section from a court which has no jurisdiction to try it.

25. Power of Supreme Court to transfer suits, etc. —

(1) On the application of a party, and after notice to the parties, and after hearing such of them as desire to be heard, the Supreme Court may, at any stage, if satisfied that an order under this section is expedient for the ends of justice, direct that any suit, appeal or other proceeding be transferred from a High

Court or other Civil Court in one State to a High Court or other Civil Court in any other State.

(2) Every application under this section shall be made by a motion which shall be supported by an affidavit.

(3) The Court to which such suit, appeal or other proceeding is transferred shall, subject to any special directions in the order of transfer, either re-try it or proceed from the stage at which it was transferred to it.

(4) In dismissing any application under this section, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum, not exceeding two thousand rupees, as it considers appropriate in the circumstances of the case.

(5) The law applicable to any suit, appeal or other proceeding transferred under this section shall be the law which the Court in which the suit, appeal or other proceeding as originally instituted ought to have applied to such suit, appeal or proceeding.

Section 25, as it originally stood, empowered the State Government to transfer a suit, appeal or other proceeding pending in High Court presided over by a single Judge to any other High Court with the consent of the State Government of that Court. The old section has, however, been substituted by the new section which confers the power of transfer of suits, etc., from a High Court or civil court in one State to another High Court or other civil court in any other State. The Supreme Court has similar power of transfer as it has in regard to criminal cases under S. 406 of the Code of Criminal Procedure, 1973.

There is then the power of the Supreme Court to transfer suits, which is provided in S. 25 of the Code. On the application of a party to the hearing of a suit, appeal or other proceeding pending in a High Court or civil court in one State and after notice to the parties, and after hearing them, the Supreme Court may, at any stage, if satisfied that an order under this section is expedient for the ends of justice, direct transfer of such suit, appeal or other proceeding to another High Court or other civil court in another State.

The plaintiff has the right to choose his own forum and the burden lies on the applicant to make out a strong case for transfer. A mere balance of convenience in favour of proceedings in another court may be a relevant consideration but will not be a sufficient ground for transfer. As a general rule the court should not interfere unless the expenses and difficulties of the trial would be so great as to lead to injustice or the suit has been filed in a particular court for the purpose of working injustice. Another valid ground for transfer is the abuse of the process of the court.

Essentials of a suit

The essentials of a suit are four in number. They are as under :

✓1. **The opposing parties.**—In every suit there must be at least one plaintiff and one defendant. There may be more than one plaintiff and more than one defendant where an act or transaction proceeds from two or more persons or it affects two or more persons.

✓2. **The cause of action.**—Every suit must contain the cause of action. The term "cause of action" refers to the cause or the set of circumstances which leads up to a suit. It consists of every fact which is necessary to be proved to entitle the plaintiff to a decree. The term has been discussed in the preceding pages.

✓3. **The subject-matter.**—It is the right or property claimed in the suit. The court adjudicates upon the rights of the parties with regard to the subject-matter in dispute.

✓4. **The relief claimed.**—The relief claimed should be stated specifically in the plaint. It may be stated in the alternative also. The relief claimed must be one which the court is able to grant. When a person is entitled to more than one relief in respect of the same cause of action, he must sue for all the reliefs. He, however, may sue for one or more of them and reserve his right with the leave of the court to sue for the rest. If no such leave is obtained he will be precluded from afterwards suing for any relief so omitted.

Different Stages of a Suit

✓1 **Institution of Suit.**—Every suit is to be instituted by presenting a plaint to the court or officer as it appoints in that behalf. When the plaint has been presented to a proper court, shows a cause of action, the relief is properly valued, is written on a sufficiently stamped paper and is not barred by any law, the court admits the plaint and then it is numbered and registered as a suit. (O. 4, r. 1).

2 **Issue and Service of Summons.**—The next step after the admission of the plaint is for the plaintiff to apply to the court for the issue of summons to the defendant to appear and answer the claim of the plaintiff. The summons has to be served in the prescribed manner. (O. 5, r. 1).

3 **Written Statement.**—After the summons has been served on the defendant, the defendant shall, at or before the first hearing or within such time as the court may permit, present a written statement of his defence dealing with each allegation in the plaint and stating with respect to each allegation whether the same is admitted or denied. (O. 8, r. 1).

4 **Discovery.**—Every party to a suit is entitled to know the nature of his opponent's case, so that he may know beforehand what case he has to meet. He is also entitled to obtain admissions from his opponent to facilitate the proof of his own case. This is termed as discovery, which may be by administering interrogatories to the opponent or by requiring him to disclose the documents by affidavit. (O. 11).

5 **First Hearing and Striking of Issues.**—On the day fixed in the summons for the defendants to appear and answer, the suit is heard if both the parties are present, unless the court adjourns it to a later date. (O. 9, r. 1).

If neither party appears when the suit is called on for hearing, the court may dismiss the suit. If the plaintiff appears and the defendant does not appear the plaintiff will be required to prove the service of summons on the defendant and on such proof of service an *ex parte* decree may be passed on the plaintiff's proving his case. Where the defendant appears and the plaintiff does not appear, the court may dismiss the suit, unless the defendant admits the claim. (O. 9, rr. 3, 6 & 8).

At the first hearing of the case when both the parties are present the court goes through the plaint, the written statement and answers to interrogatories, if any, and then examines the parties and records their admissions and denials. Only the substance of such examination forms part of the record and is not evidence in the suit. The object of such examination is to ascertain from the party or his pleader which material facts in the pleading of either party are admitted or denied by the other. On such ascertainment the court strikes issues which have to be determined to dispose of the case.

If it is found that the parties are not at issue on any question of law or fact, the court delivers the judgment. (O. 15, r. 1).

6 Production of evidence and argument.—If, however, the parties are at issue, as is generally the case, a date is fixed for hearing when the party having the right to begin states his case and produces his evidence in support of the issues. Then the other party states his case, produces his evidence and addresses the court on the whole case. (O. 18).

7 Judgment.—After the case has been heard the court may pronounce judgment at once or it may reserve its judgment and deliver the same on any future date. (O. 20).

8 Decree.—After the judgment is pronounced the successful party applies to the court for the drawing up of the decree, which is drawn up by an officer of the court. (O. 20).

9 Execution.—Execution is the final stage of the suit. It is the means employed in due process of law to make a decree or order of a court effective. The successful party makes an application in writing to the executing court when proceedings in execution are commenced. (O. 21).

Institution of Suits

26. Institution of suits.—Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

Every suit is to be instituted by presenting a plaint to the court or to such officer as it appoints in that behalf. Presentation must be by delivery to the court or to its officer either personally or by a pleader. Sending by post is not sufficient. There is nothing in the Code to suggest that a plaint should be presented during court hours or within court premises, and hence the judge or any officer of the court authorised to accept plaints may accept it outside office hours or the court buildings, though he is not bound to do so. The court shall cause the particulars of every suit to be entered in a book to be kept for the purpose, called the register of civil suits.

Order VII—Plaint

Particulars of the plaint.—The plaint shall contain the following particulars:

such entries shall be numbered in every year according to order plan.

- (1) the name of the court in which the suit is brought ;
- (2) the name, description and place of residence of the plaintiff ;
- (3) the name, description and place of residence of the defendant, so far as they can be ascertained ;
- (4) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect ;
- (5) the fact constituting the cause of action and when it arose ;
- (6) the facts showing that the court has jurisdiction ;
- (7) the relief which the plaintiff claims ;
- (8) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished ; and
- (9) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits. (O. 7, r. 1).

Additional Particulars in certain plaints

1. Where the plaintiff seeks the recovery of money the plaint shall state the precise amount claimed ; but where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, or for movables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate, the plaint shall state approximately the amount sued for. (O. 7, r. 2).

2. Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, specifying the boundaries or numbers in a record of settlement of survey. (O. 7, r. 3).

3. Where the plaintiff sues in a representative character the plaint shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps necessary to enable him to institute a suit concerning it. (O. 7, r. 4).

4. The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand. (O. 7, r. 5).

5. Where the suit is instituted after the expiration of the period of limitation, the plaint shall show the ground upon which exemption from such law is claimed. (O. 7, r. 6).

Procedure on admitting plaint.—The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents which he has produced along with it. If the plaint is admitted, he shall present as many duplicate copies or, if permitted by the court, concise statements thereof, as there are defendants. (O. 7, r. 9).

The plaintiff shall within the time fixed by the court pay the requisite fee for the service of summons on the defendants. [O. 7, r. 9 (1-A)]

Return of plaint.—Rule 10 of Order 7 provides for the return of plaint in all cases where a court is unable to entertain it for want of jurisdiction—territorial, pecuniary or other causes. If the court is satisfied that it has no jurisdiction to entertain a suit, it is its duty to give effect to that on its own initiative. To quote r. 10 of O. 7—“Subject to the provisions of r. 10-A, the plaint shall at any stage of the suit be returned to be presented to the court in which the suit should have been instituted...On returning a plaint the judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.”

Under r. 10-A, inserted by the Amendment Act, 1976, the court has power to fix a date of appearance in the court where the plaint is to be filed after its return.

If the court has no jurisdiction the proper order is to return the plaint and not dismiss it. The plaint may be returned even at the stage of argument. An appellate court can also return the plaint. Where a plaint is returned by the trial court for presentation to the proper court the court to which the plaint is presented thereafter is bound to give credit for the fee levied by the court that returned the plaint.

An order returning a plaint to be presented to the proper court, except where the procedure specified in r. 10-A of O. 7 has been followed, is appealable under O. 43, r. 1, but a second appeal does not lie.

Rejection of plaint.—The plaint shall be rejected in the following cases :—

- (a) Where it does not disclose a cause of action ;
- (b) Where the relief claimed is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so ;
- (c) Where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp-paper within a time to be fixed by the court, fails to do so ; and
- (d) Where the suit appears from the statement in the plaint to be barred by any law. (O. 7, r. 11).

The High Court of Calcutta has added another ground for rejection of the plaint, viz., the failure to file as many copies on plain paper of the plaint as there are defendants and draft forms of summons and fees for the service thereof.

The rejection of a plaint on any of the grounds mentioned above shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. (O. 7, r. 13). A fresh suit can be instituted provided it is not barred.

Parties to suits

[Order 1]

✓ **Joinder of plaintiffs.**—All persons may be joined in one suit as plaintiffs where—(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist in such persons, 1

whether jointly, severally or in the alternative ; and (b) if such persons brought separate suits, any common question of law or fact would arise. (O. 1, r. 1). Thus where A publishes a series of books under the title of "The Oxford and Cambridge Publications" so as to induce the belief that the books are the publications of the Oxford and Cambridge Universities, the two Universities may join as plaintiffs in one suit to restrain A from using the title because the publication and the belief are common questions of fact arising out of the same series of transactions. But several persons cannot file a joint suit for damages for their wrongful detention in jail after the expiry of their term of imprisonment. All persons having a common cause of action are entitled to join as plaintiffs.

Separate trials.—Where it appears to the court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient. (O. 1, r. 2).

Joinder of defendants.—All persons may be joined in one suit as defendants where—(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative ; and (b) if separate suits were brought against such persons, any common question of law or fact would arise. (O. 1, r. 3). Thus where A received injuries while riding in an omnibus belonging to B through a collision between that omnibus and a cart belonging to C, A may joint B and C as defendants in one suit for damages for personal injury caused by their negligence because the injury to the plaintiff arose from the same transaction or series of transactions and the case involves common questions of fact.

Where it appears to the court that any joinder of defendants may embarrass or delay the trial of the suit, the court may order separate trials or make such other order as may be expedient in the interests of justice. (O. 1, r. 3-A).

Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants. (O. 1, r. 7).

Non-joinder of parties.—Where a person who is a necessary party to a suit has not been joined as a party to the suit it is a case of non-joinder. A suit should not be dismissed on the ground of non-joinder. A distinction has to be drawn between the non-joinder of a person who ought to have been joined as a party and the non-joinder of a person whose joinder is only a matter of convenience or expediency. If the decree cannot be effective without the absent parties, the suit is liable to be dismissed. In cases where the joinder of a person as a party is only a matter of convenience, the absent party may be added or the suit may be tried without him.

Misjoinder.—Where there are more plaintiffs than one and they are joined together in one suit, but the right to relief alleged to exist in each plaintiff does not arise out of the same act or transaction and if separate suits were brought no common question of law or fact would arise, it is a case of misjoinder of plaintiffs. Misjoinder of defendants takes place when two or more persons are joined as defendants in one suit, but the right to relief alleged to exist against such of them does not arise from the same act or transaction and there is no common question of law or fact. Similarly a misjoinder of plaintiffs and causes of action takes place where in a suit there are two or more plaintiffs and two or more causes of action but the plaintiffs are not jointly

interested in all the causes of action. A misjoinder of defendants and causes of action takes place where in a suit there are two or more defendants and two or more causes of action, but different causes of action have been joined against different defendants separately.

Order 1, rule 13 provides that all objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

Multifariousness.—Misjoinder of parties and causes of action in a suit is technically called multifariousness. Where in a suit there are two or more defendants and two or more causes of action, the suit will be bad for misjoinder of defendants and causes of action, if different causes of action are joined against different defendants separately. The joinder of such separate causes of action and separate defendants makes the suit bad for multifariousness. The objection on the ground of multifariousness should be taken at the earliest opportunity and any objection not so taken shall be deemed to have been waived.

Effect of non-joinder or misjoinder of parties and multifariousness.—As stated above, non-joinder or misjoinder of parties is not fatal to the suit. Order 1, r. 9, clearly lays down that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. The only exception provided to this rule is furnished by the general principle that a court will refrain from passing a decree which would be ineffective and infructuous. The inability of the court to pass an effective decree, when all the parties interested in the subject-matter of the suit are not before it, may be due either to the nature of the action or the nature of the interest that the person, who is not made a party to the action, has in the subject-matter of the suit. In the former class of cases come suits for partition or dissolution of partnership and rendition of accounts, while in the latter class come suits with respect to some property belonging to a joint Hindu family when all the coparceners are not made parties. But these rules have no application where the interest of the person not impleaded as a party in the suit is ascertained or ascertainable. (*Zebaishi Begum v. Naziruddin Khan*, 57 All. 445).

To sum up, in the case of non-joinder of *necessary* parties the court cannot pass an effective decree in their absence. In such a case the suit cannot proceed and is liable to be dismissed if the plaintiff on being provided with an opportunity to amend the plaint refuses to do so. But in the case of non-joinder of *proper* parties the non-joinder is not fatal. The court can add the absent party or try the suit without him.

Once a multifarious suit is allowed to proceed to trial and results in a decree without recourse to rule 9 of Order 1 the plea of multifariousness should be deemed to be waived. Section 99 provides that no decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the court.

Where necessary party refuses to join as plaintiff.—If any person who ought to have been joined as plaintiff does not consent to join as plaintiff, he may be made a defendant in the suit.

Suit against a dead person.—Where a suit is brought against a person who is found to have died before its institution, the plaint cannot be amended by bringing his legal representative on the record, though the suit may have been filed in ignorance of his death, for a suit against a dead person is a nullity. But if the suit is against several defendants one of whom is found to have died before the institution, the suit will not be dismissed and will be proceeded against the other defendants and the legal representative of the defendant can be joined if he was a necessary party.

Suits in the name of wrong plaintiff.—(1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the court thinks just.

(2) The court may at any stage of the proceedings strike out the name of any party improperly joined, or add the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary to enable it to adjudicate upon and settle all the questions involved in the suit.

(3) No person shall be added as plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where a defendant is added, the plaint shall be amended, and amended copies of the summons and of the plaint shall be served on the new defendant.

(5) The proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons. (O. 1, r. 10).

Addition of Party.—O. 1, r. 10 involves both a narrower scope and wide scope, and while a necessary party, that is, a party without whom a legal decree cannot be passed in a suit, has every right to be included, even a 'proper' party can press for such relief. The court must primarily consider whether the presence of that party would advance the total and satisfactory adjudication of the *lis* or the subject-matter of controversy. If the presence of such a party would be essential or highly desirable in the interests of justice, the Court has a wide discretion to implead such a party also. In a suit for dissolution of partnership and accounts in which one partner is the head of a joint Hindu family, the son of such a partner is a proper party and can be impleaded to safeguard the interests of the family though he cannot get any right adjudicated by a decree in the suit *inter se* between himself and his father. [*Raja Ram G. A. v. Anantaram*, (1957) 1 M. L. J. 36].

Under O. 1, r. 10 (2) the court is empowered to add a party on either of the two grounds, viz., (1) that he should have been joined when the suit was originally instituted but was not joined through inadvertence or otherwise; (2) that though he might not have been a necessary or proper party at the time of institution of the suit, his presence has since become necessary to

enable the court to effectually and completely adjudicate and settle all the questions involved in the suit. [*Setabi Dei v. Ramadhani Shaw*, A. I. R. 1966 Cal. 60].

The provision of O. 1, r. 10 (2), C. P. C. is meant to give to every person an opportunity of being heard whose rights might be affected by the ultimate decree. It also provides for striking out of the names of persons whose interest or rights may not be affected. [*Raj Singh v. Ram Nivas*, 1977 (3) A. I. R. 9].

It is a settled principle of law that the *benamidar* sufficiently represents the real owner and the decision in the proceeding brought by or against the *benamidar* will bind the real owner, even though he may not have been made a party.

It is well settled that in a proceeding by or against the *benamidar* the person beneficially entitled is fully affected by the rules of *res judicata*. It is open to the beneficial owner to apply to be joined in an action, but whether he is or is not made a party, a proceeding by or against the *benamidar*, who is his representative in its ultimate result, is fully binding on him. [*Gur Narayan v. Sheo Lal Singh*, A. I. R. 1918 P. C. 140 and *Farni Prasad Sinha v. Lachuman Sahu*, A. I. R. 1976 Patna, 69].

Representative Suit

(O. 1, r. 8)

(1) The general rule is that all persons interested in a suit ought to be made parties thereto, but there is an exception to this general rule where one or more persons may sue or defend on behalf of all having the same interest in the suit. Such suits are called representative suits and are governed by Order 1, rule 8, of the Code of Civil Procedure, which provides that where there are numerous persons having the same interest in one suit,—(a) one or more of such persons may, with the permission of the court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested; (b) the court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

(2) But the court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the court to be made a party to such suit.

(4) No part of the claim in any such suit shall be abandoned and no such suit shall be withdrawn and no agreement, compromise or satisfaction shall be recorded in any such suit, unless the court has given, at the plaintiff's expense, notice to all persons so interested in the manner specified in sub-rule (2)

(5) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the court may substitute in his place any other person having the same interest in the suit.

(6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be.

Explanation.—For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of action as the persons on whose behalf, or for whose benefit, they sue or are sued, or defend the suit as the case may be.

It will thus be seen from the above that there are four conditions before the provisions of this rule can apply. They are as under : (1) the parties are numerous—the word ‘numerous’ is by no means a term of art. (2) It implies a group of persons, such as would make it inconvenient to implead all of them individually. The word is not synonymous with “numberless” or “innumerable”. The number must be definite for the court to recognise as non-impleaded parties to the suit ; they have the same interest ; (3) the necessary permission of the court has been obtained ; (4) notice has been given to all the persons interested in the suit.

The object of the rule is to afford convenience in suits where there is a community of interest amongst a large number of persons, so that a few should be allowed to represent the whole in order to save trouble and expense. It is designed to save time and expense and to insure a convenient trial of questions in which in a large body of persons are interested while avoiding multiplicity of suits and harassment to parties.

The object for which this provision is enacted is really to facilitate the decision of a question in which a large body of persons are interested without recourse to the ordinary procedure. In cases where the common right or interest of a community of members of an association or large sections is involved there will be insuperable practical difficulty in the institution of suits under the ordinary procedure, where each individual has to maintain an action by a separate suit. [*Kodia Goundar v. Telandi Goundar*, A. I. R. 1965 Mad. 281].

A decree passed in a representative suit operates as *res judicata* in a subsequent suit against such interested persons although they may not have been added as parties to the suit. Explanation VI to S. 11 provides that where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Power of court to permit a person or body of persons to present opinion or to take part in the proceedings.—While trying a suit, the court may, if satisfied that a person or body of persons is interested in any question of law which is directly and substantially in issue in the suit and that it is necessary in the public interest to allow that person or body of persons to present his or its opinion on that question of law, permit that person or body of persons to present such opinion and to take such part in the proceedings of the suit as the court may specify. (O. 1, r. 8-A).

FRAME OF SUIT

(ORDER II)

Every suit shall, as far as practicable, be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. (O. 2, r. 1). The above rule signifies that the object of the

legislature appears to be that as far as possible all matters in dispute between the parties relating to the same transaction should be disposed of in the same suit. Where there is common question of law and fact separate suits are neither necessary nor desirable.

Splitting of Claim [O. 2, r. 2]

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action ; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs ; but if he omits, except with the leave of the court to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

Illustration

A lets a house to *B* at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. *A* sues *B* in 1908 only for the rent due for 1906. *A* shall not afterwards sue *B* for the rent due for 1905 or 1907.

Order 2, rule 2, enacts that if a plaintiff fails to sue for the whole of the claim which he is entitled to make in respect of a cause of action in the first suit, then he is precluded from suing in a second suit in respect of the portion so omitted. The provisions of the rule only compel a plaintiff to include in his suit the whole of the claim arising out of the cause of action. They do not compel him to join in the same suit every cause of action or every claim which he has.

The object of the rule is clearly to avoid splitting up of claims or reliefs and to prevent multiplicity of suits. The rule is directed against two evils, the splitting up of claims and the splitting up of remedies. It does not bar pleas in defence. The underlying principle is that a defendant is not to be twice vexed for one and the same cause.

In order to apply the provisions of O. 2, r. 2 of the Civil Procedure Code to bar a suit, what was essential to be found out was (1) as to what was the cause of action in respect of which the claim was made in the previous suit, (2) whether the claim or a portion of a claim made in the subsequent suit was based on the same cause of action as the previous one and was between the same parties. Unless the second condition was fulfilled, there could be no bar to the claim made in the subsequent suit. In determining the cause of action, it was not that it should be merely similar but it should be the same one and identical with the previous one, as against distinct. The tests for the same were whether the genesis of the right to action was the same ; and whether for establishing the claim same evidence is required and, secondly, whether the parties are the

same, and there would not arise any bar by reason of O. 2, r. 3 of the Civil Procedure Code. (*Chaman Nathubhai v. Chaman Hirabhai*, I. L. R. 1967 Guj. 545).

The principle behind the provisions of O. 2, r. 2, C. P. C., is that the defendant should not be twice vexed for one and the same cause of action. The conditions which are essential for attracting the provisions of O. 2, r. 2, C. P. C., are : (1) that the previous and the present suit must arise out of the same cause of action ; (2) that in respect of the same cause of action the plaintiff was entitled to more than one relief ; and (3) that without the leave of the court the plaintiff omitted to sue for the relief for which the second suit had been filed. A test to find out whether the cause of action is the same is to see whether the same evidence will sustain both the suits. It is not necessary that in order to constitute the same cause of action all the allegations made in the two suits should be exactly identical. A cause of action consists of all facts which it is essential for the plaintiff to allege and to establish and which taken with the law applicable to him gives the plaintiff a right against the defendant. It has also been defined by the courts as all essential facts constituting the right and its infringement.

In a partition suit all the properties of the joint family must be included. It is not open to a member of the joint family to ask for a partition of a certain item and leave the rest, except in certain cases, such as, where some of the items could not be divided by reason of their being in possession of usufructuary mortgagees, or, being under a long lease, or, set apart for maintenance of a widow or some member of the family, or, some other reasons. When, therefore, a plaintiff intentionally, not by mistake or inadvertence, nor due to ignorance or oversight, nor with the consent of the co-owners, nor with the leave of the Court, does not include a property in his previous partition suit, although he knows about its existence, and, none of the circumstances above mentioned exist, the provisions of sub-rule (2) of R. 2 of Order 2 of the Code will apply. The cause of action, in such a case, in the two suits being the same, the plaintiff's suit will come within the mischief of O. 2, r. 2 of the Code. The omission to include the properties in the earlier suit must be held to be deliberate or intentional. Even if it be accepted that it was left out by mistake, the case would still come within the mischief of O. 2, r. 2 of the Code. (*Ram Chander Prasad v. Muhteshwar Nath*, 1975 (1) A. L. R. 554).

The very language of O. 2, r. 2, indicates that it is the subsequent suit which is barred and not both the suits. In order to apply O. 2, r. 2, two conditions must be satisfied, firstly, that the previous and the present suit must arise out of the same cause of action, and secondly, both the suits must be between the same parties. (*A. Suryanarayan Murthi v. Adi Chandramma Dhora*, (1966) 2 An. W. R. 253).

The test to find out whether a subsequent suit is barred by O. 2, r. 2, is to see whether the cause of action in the previous suit and the subsequent suit is the same, and whether the plaintiff could have and should have claimed in the former suit the relief which he claims in the subsequent suit.

The rule requires that every suit shall include the whole of the claim arising from one and the same cause of action and not that every suit shall include every claim or every cause of action arising out of the same transaction. Its operation is confined to cases where the plaintiff is entitled to more than

one relief in respect to the same causes of action, and not to causes where he is entitled to one relief out of many reliefs to which he may be entitled. In other words, O. 2, r. 2, creates a bar where only cumulative relief can be, but are not asked for, and not where one of the alternative reliefs can be and is asked for in the first suit. (*Shripal Gopal Krishna v. Sidram Satappa*, 52 Bom. L. R. 594).

The wording of O. 2, r. 2, C. P. C. is founded upon the principle that a person shall not be entitled to two reliefs in the same cause. It is directed against two evils, i. e., the splitting up of a claim and the splitting up of a remedy. Where there were two breaches of contract in one contract and both occurred before any suit was brought, the cause of action within the meaning of O. 2, r. 2, is the non-performance of the promise and only one suit will lie. (*Union of India v. Firm Baijnath Govind Das*, 1956 A. L. J. 918).

In order that the cause of action for two suits may be the same, it is necessary that not only the facts which would entitle the plaintiff to establish his title to the property claimed in the two suits be the same but also that the attack on the title or the infringement of the plaintiff's right at the hands of the defendant must have arisen in substance out of the same transaction. (*Jokhi Ram v. Sardar Singh*, 1955 A. L. J. 579).

Omission or relinquishment of claim.—Casual omission of some items of property from the schedule to the plaint does not mean abandonment of claim. Omission will also not bar if the plaintiff was not aware of his claim or right. It has been held that even though he could by proper enquiry have made himself aware of its existence, if the plaintiff was unaware of the claim at the time of his suit, its non-inclusion will not preclude him from subsequently suing in respect of that claim. (*Chandikamba v. Veswandhamayya*, 1936 M. 699). The omission refers to intentional omission and not accidental omission. Relinquishment refers primarily to that before the institution of the suit. And where a person chooses a court by relinquishing a part of his claim, a subsequent suit for the relinquished portion of the claim will be barred by this rule. No subsequent order of the court can revive the right.

Omission to sue for all reliefs.—When a person is entitled to more than one relief in respect of the same cause of action, he may sue for all the reliefs or he may sue for one or more of them and reserve his right with the leave of the court to sue for the rest. If no such leave is obtained, he will be precluded from afterwards suing for any relief so omitted. But if the right to the relief in respect of which a further suit is brought did not exist at the date of the institution of the former suit, the subsequent suit is not barred.

Exceptions to the rule of splitting of claims.—1. Rule 2 of Order 2 does not apply to applications for execution. An application for partial execution is not a bar to subsequent application for execution of the rest of the decree.

2. Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order 2, rule 2.

3. Failure to claim set off is no bar to a subsequent suit,

4. The bar of O. 2, r. 2, C. P. C., may not apply to a petition for a high prerogative writ under Art. 226 of the Constitution. (*Devendra Pratap v. State of Uttar Pradesh*, A. I. R. 1962 S. C. 1334).

Joinder of causes of action : O. 2, rr. 2-6.—(1) Where there is only one plaintiff and only one defendant O. 2, rule 3, provides that the plaintiff may unite in the same suit several causes of action against the same defendant. But where it appears to the court that the joinder of causes of action in one suit may embarrass or delay the trial or is otherwise inconvenient, the court may order separate trials or make such order as may be expedient in the interests of justice. [O. 2, r. 6].

(2) Where there is one plaintiff and several defendants and several causes of action the plaintiff may unite in the same suit several causes of action against the same defendants if the defendants are jointly interested in the causes of action.

(3) Where there are two or more plaintiffs and the defendants and causes of action are also several, the plaintiffs may unite the cause of action against the defendants in one suit, if the plaintiffs are jointly interested in the causes of action and the defendants are also jointly interested in them.

Besides the above, there are two general rules which apply to all cases irrespective of the number of plaintiffs or the number of defendants and they are provided in Order 2, rules 4 and 5. Order 2, rule 4 provides that in a suit for the recovery of immovable property, a plaintiff is not entitled, without the leave of the court, to join in any claim except (1) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof, (2) claims for damages for breach of any contract under which the property is held, and (3) claims in which the relief sought is based on the same cause of action. Order 2, rule 5, provides that no claim by or against an executor, administrator or heir as such shall be joined with claims by or against him personally.

Objections as to misjoinder of causes of action.—All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived. (O. 2, r. 7).

ISSUE AND SERVICE OF SUMMONS TO DEFENDANT

(Sections 27-29 & Order V)

Definition.—Summons is a document issued from the office of a court of justice, calling upon the person to whom it is directed to attend before a judge or officer of the court on the day mentioned therein.

27. Summons to defendant.—Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in the manner prescribed.

Where a suit has been duly instituted by filing a plaint, the first duty of the court is to issue a summons calling on the defendant to appear and answer the claim on a day specified therein either in person or by pleader duly instructed or accompanied by some person able to answer all material

questions. The only exception is where the defendant appears on the presentation of the plaint and admits the plaintiff's claim ; and in that case no such summons shall be issued. Every such summons shall be signed by the Judge or such officer as he appoints and shall be sealed with the seal of the court. Where a summons has been issued, the Court may direct the defendant to file the written statement of his defence, if any, on the date of his appearance and cause an entry to be made to that effect in the summons. (S. 27 and O. 5, r. 1).

A summons mentioning wrong date for appearance or appearance on a day when the court is closed, is not a summons as required under O. 5, r. 1. No law or procedure requires the defendant to appear on the next following date in such cases. The date given in the summons is its essential ingredient. (A. I. R. 1964 Madh. Pra. 261).

28. Service of summons where defendant resides in another State.—(1) A summons may be sent for service in another State to such Court and in such manner as may be prescribed by rules in force in that State.

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto.

(3) Where the language of the summons sent for service in another State is different from the language of the record referred to in sub-section (2), a translation of the record,—

(a) in Hindi, where the language of the Court issuing the summons is Hindi ; or

(b) in Hindi or English where the language of such record is other than Hindi or English ;

shall also be sent together with the record sent under that sub-section.

29. Service of foreign summonses.—Summonses and other processes issued by—

(a) any Civil or Revenue Court established in any part of India to which the provisions of this Code do not extend ; or

(b) any Civil or Revenue Court established or continued by the authority of the Central Government outside India ; or

(c) any other Civil or Revenue Court outside India to which the Central Government has, by notification in the official Gazette, declared the provisions of this section to apply,

may be sent to the Courts in the territories to which this Code extends, and served as if they were summonses issued by such Courts.

Essentials of a summons.—Every summons shall (i) intimate to the defendant of the date of hearing and whether he is to appear in person or by a pleader; (ii) contain a direction whether the date is fixed for settlement of issues only or for final disposal of the suit, and (iii) order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case. A summons in a small cause court suit shall be for final disposal and shall direct the defendant to produce his witnesses on the date fixed upon whose evidence he intends to rely in support of his case.

Exemption from attendance.—No party shall be ordered to appear in person (1) unless he resides (a) within the local limits of the court's ordinary original jurisdiction, or (b) without such limits but at a place less than 50 or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the court is situate), less than 200 miles distance from the court house. (O. 5, r. 4);

(2) If she is a woman not appearing in public according to the customs and manners of the country (S. 132); and

(3) If he falls in the category of persons exempted from personal appearance in Court under S. 133, viz., (i) the President of India, (ii) the Vice-President of India, (iii) the Speaker of the House of the People, (iv) the Ministers of the Union, (v) the Judges of the Supreme Court, (vi) the Governors of States and the Administrators of Union territories, (vii) the Speakers of the States Legislative Assemblies, (viii) the Chairmen of the State Legislative Councils, (ix) the Ministers of States, (x) the Judges of the High Courts, and (xi) rulers of any former Indian States. (S. 133).

MODES OF SERVICE

1. Personal or Direct Service.—Whenever it is practicable service should be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient. Where there are two or more defendants, service should be made on each defendant. Where the defendant is absent from his residence at the time when the service of summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of his family, whether male or female, but not a servant. In a suit for immovable property service may be made on any agent in charge of the property if the service cannot be made on the defendant personally and the defendant has no agent empowered to accept the service. [O. 5, rr. 11-15].

Such personal service is also called direct service because service is made by delivering a copy thereof to the defendant personally, or to an agent or other person on his behalf and the signature of the person to whom the copy is so delivered is obtained to an acknowledgment of service endorsed on the original summons.

2. Service by affixing a copy of summons on defendant's house without an order of the Court.—(a) Where the defendant or his agent or in their absence an adult member of the family refuses to sign the acknowledgment, or (b) where the serving officer after using all due and reasonable diligence, cannot find the defendant who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and there is no such other person on whom service can be effected, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, with a report endorsed thereon stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed. If the court is satisfied, it declares the service to have been duly effected. [O. 5, r. 17]. A simple delivery of the copy of the summons personally to the defendant is not complete; the process-server must in order to make the service complete also obtain the signature of the defendant to its acknowledgment; and where he refuses to sign it is incumbent to effect service under rule 17.

3. Service by registered post in addition to personal service.—The court shall, in addition to, and simultaneously with, the issue of summons for service also direct the summons to be served by registered post, acknowledgment due, addressed to the defendant, or his agent empowered to accept the service, at the place where the defendant, or his agent, actually and voluntarily resides or carries on business or personally works for gain. The court, however, shall not issue a summons for service by registered post, where, in the circumstances of the case, it considers it unnecessary.

Where an acknowledgment purporting to be signed by the defendant or his agent is received by the court or the postal article containing the summons is received back by the court with an endorsement purporting to have been made by a postal employee to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons, when tendered to him, the court issuing the summons shall declare that the summons had been duly served on the defendant; provided that where the summons was properly addressed, prepaid and duly sent by registered post, acknowledgment due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the court within thirty days from the date of the issue of the summons. (O. 5, r. 19-A).

4. Substituted Service.—Where the court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any reason the summons cannot be served in the ordinary way, the court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit. Service may be ordered to be effected by publication in a local newspaper, which shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain. Service substituted by order of the court shall be as effectual as if it has been made on the defendant personally. [O. 5, r. 20].

SERVICE OF SUMMONS IN PARTICULAR CASES

1. **Suit relating to business.**—In a suit relating to any business or work against a person not residing within the jurisdiction of the court issuing the summons, service on any manager or agent carrying on such business or work is sufficient.

The master of a ship is the agent of the owner or charterer. [O. 5, r. 13].

2. **Where defendant resides within the jurisdiction of another court.**—Service outside jurisdiction can only be done by an officer of the court, with an order from a court having jurisdiction over the place where he resides. Rule 21 of Order 5 lays down that a summons may be sent by the court by which it is issued, whether within or without the State, either by one of its officers or by post to any court (not being the High Court) having jurisdiction in the place where the defendant resides.

3. **Where defendant is confined in prison.**—Where the defendant is confined in prison, the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison for service on the defendant. [O. 5, r. 24]. The court shall take judicial notice of the signature of the jailor on its return.

4. **Service where defendant resides out of India and has no agent.**—Where the defendant resides out of India and has no agent in India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the court is situate.

Where the defendant resides in Bangladesh or Pakistan.—Where the defendant resides in Bangladesh or Pakistan, the summons, together with a copy thereof, may be sent for service on the defendant, to any court in that country (not being the High Court) having jurisdiction in the place where the defendant resides. And where any such defendant is a public officer in Bangladesh or Pakistan (not belonging to the Bangladesh or Pakistan military, naval or air forces) or is a servant of a railway company or local authority in that country, the summons, together with a copy thereof, may be sent for service, on the defendant, to such officer or authority in that country as the Central Government may, by notification in the Official Gazette, specify in this behalf. [O. 5, r. 25].

The rule relating to service on defendants residing in Pakistan was added by the Amending Act XIX of 1951. This amendment aims at implementing the agreement entered into with the Pakistan Government on reciprocal basis. 'Bangladesh' has been included in the rule by the Amendment Act, 1976.

5. **Where the defendant is a public officer or servant of railway company or local authority.**—Where the defendant is a public officer (not belonging to the Indian military, naval or air force), or is the servant of a railway company or local authority, the court may send the summons for service on the defendant to the head of the office in which he is employed, together with a copy to be retained by the defendant. [O. 5, r. 27].

6. **Service on soldiers, sailors or airmen.**—Where the defendant is a soldier, sailor or airman, the court shall send the summons for service to his

commanding officer together with a copy to be retained by the defendant. (O. 5, r. 28).

Duty of persons to whom summons is sent for service.—Where a summons is delivered or sent to any person for service under rules 24, 27 or 28, such person is bound to serve it, if possible, and return it under his signature, with the written acknowledgment of the defendant, and such signature is deemed to be evidence of service. If for any cause service is impossible, the summons has to be returned to the court with a full statement of such cause and of the steps taken to procure service, and such statement is deemed to be evidence of non-service. (O. 5, r. 29).

7. Substitution of letter for summons.—Where the defendant is, in the opinion of the court, of a rank entitling him to such mark of consideration, the court may substitute for a summons a letter signed by the judge or such officer appointed by him, containing all the particulars of a summons. Such a letter may be sent to the defendant by post, by a special messenger or in any other manner; and, where the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent. (O. 5, r. 30).

RECOGNIZED AGENTS AND PLEADERS

[Order III]

Before proceeding to the next stage of the suit, viz., filing of written statement by the defendant to controvert the plaintiff's allegations, a few words may be said about pleaders and recognised agents. A pleader is a person who is entitled to appear and plead for another in court, and includes an advocate, a vakil or an attorney of a High Court. He represents his client in various stages of the litigation and takes necessary steps for properly presenting the case of the client before the court.

Any appearance, application or act in or to any court may be made or done by the party in person, or by his recognised agent, or by a pleader on his behalf. (O. 3, r. 1).

Recognised agents are (1) persons holding powers of attorney, (2) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court in matters connected with such trade or business only, where there is no other agent authorised to make and do such appearances, applications and acts, [O. 3, r. 2], and (3) persons specially appointed by Government to prosecute or defend on behalf of foreign rulers. (S. 85).

Appointment of pleader.—No pleader shall act for any person in any court, unless he has been appointed for the purpose by such person by a document in writing, signed by the party, and filed in court, and shall be in force until determined, with the leave of the court, by a writing signed by the client or the pleader and filed in court; or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client. [O. 3, r. 4 (1-2)].

Explanation : For the purposes of sub-r. 4, (2), the following shall be deemed to be proceedings in the suit,—(a) an application for the review of decree or order in the suit; (b) an application under S. 144 or under S. 152 of the Code, in relation to any decree or order made in the suit; (c) an appeal from any

decree or order in the suit, and (d) an application or act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of obtaining refund of moneys paid into the court in connection with the suit.

Nothing above shall be construed—(a) as extending, as between the pleader and his client, the duration for which the pleader is engaged, or (b) as authorising service on the pleader of any notice or document issued by any court other than the court for which the pleader was engaged, except where such service was expressly agreed to by the client in the document referred to in sub-r. (1). [O. 3, r. 4 (3)].

The actual, though implied, authority of a pleader to act by way of compromising a case in which he is engaged even without specific consent from his client, must be upheld, subject undoubtedly to two overriding considerations: (1) he must act in good faith and for the benefit of his client; otherwise the power fails: (2) it is prudent and proper to consult his client and take his consent if there is time and opportunity. In any case, if there is any instruction to the contrary or withdrawal of authority, the implicit power to compromise in the pleader will fall to the ground. (*Smt. Jamilabai Abdul Kadar v. Shankarlal Gulabchand and others*, 1976 (II) S. C. J., p. 5).

Service of process on pleader.—Any process served on the pleader who has been duly appointed to act in court for any party or left at the office or ordinary residence of such pleader, and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents. (O. 3, r. 5).

Processes served on the recognised agent of a party shall be as effectual as if the same had been served on the party in person unless the court otherwise directs. (O. 3, r. 5).

WRITTEN STATEMENT AND SET-OFF

[Order VIII]

Written Statement.—The defendant shall at or before the first hearing or within such time as the court may permit, present a written statement of his defence. (O. 8, r. 1).

Save as otherwise provided in r. 8-A, where the defendant relies on any document (whether or not in his possession or power) in support of his defence or claim for set-off or counter-claim he shall enter such documents in a list, and shall,—(a) if a written statement is presented, annex the list to the written statement (and where he claims a set-off or makes a counter-claim based on a document in his possession or power, he shall produce it in court at the time of presentation of the written statement and shall at the same time deliver the document or copy thereof to be filed with the written statement); and (b) if a written statement is not presented, present the list to the court at the first hearing of the suit. [O. 8, r. 1 (2)]. Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is. If no such list is so annexed or presented, the defendant shall be allowed such further period for the purpose as the court may think fit. [O. 8, r. 1 (3-4)]. A document which ought to be entered in the list and which is not so entered, shall not, without the leave of the court, be received in evidence on behalf of the defendant at the hearing of the suit,

[O. 8, r. 1(5)]. Nothing in sub-rule (5) shall, however, apply to documents produced for the cross-examination of plaintiff's witnesses or in answer to any case set up by the plaintiff subsequent to the filing of the plaint, or handed over to a witness merely to refresh his memory. [O. 8, r. 1 (6)].

(Duty of defendant to produce documents upon which relief is claimed by him.)
—Where a defendant bases his defence upon a document in his possession or power, he shall produce it in court when the written statement is presented by him and shall, at the same time, deliver the document or copy thereof, to be filed with the written statement. [O. 8, r. 8-A).

The written-statement must contain a statement in a concise form of the material facts on which the defendant relies for his defence, but not the evidence by which they are to be proved. He must raise by his pleading all matters which show that the suit is not maintainable or that the transaction is either void or voidable in point of law, and all such grounds of defence must also be stated which, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as for instance, fraud, limitation, release, payment, performance, or facts showing illegality. (O. 8, r. 2). The defendant must deal specifically with each allegation of fact of which he does not admit the truth. It shall not be sufficient for him in his written-statement to deny generally the grounds alleged by the plaintiff. There must be no evasive denial of fact, for every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability. Thus if it is alleged that the defendant received a certain sum of money it shall not be sufficient to deny that he received that particular amount but he must deny that he received that sum or any part thereof, or else set out how much he received. (O. 8, rr. 4 and 5). If the allegations of fact made in the plaint have not been specifically denied they should be deemed to have been admitted. (*Misri Lal v. Bhagwati Prasad*, 1955 A. L. J. 741).

Where the defendant has not filed a pleading, it shall be lawful for the court to pronounce judgment on the basis of facts contained in the plaint, except as against a person under a disability, but the court may, in its discretion, require any such fact to be proved. In exercising its discretion the court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

Where the defendant relies upon several distinct grounds of defence founded upon separate and distinct facts, they must be stated separately and distinctly. (O. 8, r. 7).

The defendant may also in a suit for recovery of money file the particulars of the debt sought to be set off in the written-statement, which shall have the same effect as a plaint in a cross suit.

Subsequent pleadings.—No pleading subsequent to the written-statement of a defendant other than by way of defence to a set off or counter-claim shall be presented except by the leave of the court and upon such terms as the court thinks fit, but the court may at any time require a written-statement or additional written-statement from any of the parties and fix a time for presenting the same. (O. 8, r. 9).

Additional written-statement.—Merely because the amendment sought is alleged to be inconsistent with the previous case of the defendant, it is not

a good reason for rejecting the application of the defendant for amendment. The general rule applicable to a case of this nature is that leave to amend ought to be granted unless the party applying is acting *mala fide* or by his blunder has done some injury to his opponent which cannot be compensated by award of costs; otherwise whether the original omission arose from negligence, carelessness, or accidental error, the defect may be allowed to be remedied if no injustice is done to the other side. (*Union of India v. Shalimar Tar Products*, I. L. R. 31 Patna, 775).

Set-off.—Set-off is a reciprocal acquittal of debts. In an action to recover money, a set-off is a cross-claim for money by the defendant, for which he might maintain an action against the plaintiff, and which has the effect of extinguishing the plaintiff's claim *pro tanto*.

Particulars of set-off.—Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the court, and both parties fill the same character as they fill in the plaintiff's suit, (the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the court, present a written-statement containing the particulars of the debt sought to be set-off.

Effect of set-off.—The written statement shall have the same effect as a plaint in a cross-suit so as to enable the court to pronounce a final judgment in respect both of the original claim and of the set-off. (O. 8, r. 6).

LEGAL SET-OFF

Illustrations.—Legal set-off may be explained by a few illustrations.

(a) A suit is brought by a Hindu son as the heir and representative of his father to recover from B certain debt due to the father. B claims to set-off a debt due to him by A's father. B may do so, for both the parties fill the same character. But the amount due as manager cannot be set-off against a personal liability, for both parties do not fill the same character.

(b) A bequeaths Rs. 2000 to B and appoints C his executor and residuary legatee. B dies and D takes out administration to B's effects. C pays Rs. 1,000 as surety for D; then D sues C for the legacy. C cannot set-off the debt of Rs. 1,000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of the Rs. 1,000.

(c) A dies intestate and in debt to B. C takes out administration to A's effects and B buys part of the effects from C. In a suit for the purchase-money by C against B, the latter cannot set-off the debt against the price, for C fills two different characters, one as the vendor to B, in which he sues B, and the other as representative to A.

(d) A sues B on a bill of exchange. B alleges that A has wrongfully neglected to insure B's goods and is liable to him in compensation which he claims to set-off. The amount not being ascertained cannot be set-off.

(e) A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1,000. The two claims being both definite, pecuniary demands may be set-off.

(f) A sues B for compensation on account of trespass. B holds a promissory note for Rs. 1,000 from A and claims to set-off that amount against

any sum that *A* may recover in the suit. *B* may do so, for, as soon as *A* recovers, both sums are definite pecuniary demands.

(g) *A* and *B* sue *C* for Rs. 1,000. *C* cannot set-off a debt due to him by *A* alone.

(h) *A* sues *B* and *C* for Rs. 1,000. *B* cannot set-off a debt due to him alone by *A*.

(i) *A* owes the partnership firm of *B* and *C* Rs. 1,000. *B* dies, leaving *C* surviving. *A* sues *C* for a debt of Rs. 1,000 due in his separate character. *C* may set-off the debt of Rs. 1,000.

The set-off mentioned above is a legal set-off. It is apparent from a reading of the above provisions that in order to constitute legal set-off, the following conditions must be fulfilled, viz.,

(a) The suit must be for recovery of money.

(b) The defendant must claim an ascertained sum of money. A sum of money due in respect of a disputed transaction cannot constitute an ascertained sum.

(c) That ascertained sum must be legally recoverable from the plaintiff, i. e., it is not barred by the law of limitation.

(d) The plaintiff's claim and the set-off must be claimed in the same character. The amount must be recoverable by the defendant and if there are more than one defendant then by all the defendants. Again, the amount must be recoverable by the defendant from the plaintiff and if there are more than one plaintiff then from all the plaintiffs.

(e) The set-off should be within the pecuniary jurisdiction of the court.

The above provisions further establish that the court must treat the claim of the defendant exactly as if the defendant had filed a plaint and the court must pass a decree in favour of the defendant, if his claim is established, even though the claim of the plaintiff against the defendant is dismissed. (*Bansi Dhar Kunjilal v. Lalta Prasad*, 1934 A. L. J. 393). It is only in a written statement that a plea of set-off can be raised. The rule further confines only to set-off and does not provide for a counter-claim, which is allowed by way of equitable set-off.

Equitable set-off.—By equitable set-off we mean that form of set-off which the Courts of Equity in England allowed when cross demands arose out of the same transaction, even if the money claimed by way of set-off was an unascertained sum of money. The Common Law Courts refused to take notice of equitable claims for they were not ascertained sums. The Courts of Equity, however, held that it would be inequitable to drive the defendant to a separate cross-suit and that he might be allowed to plead a set-off though the amount might be unascertained. Such a set-off is called an equitable set-off.

The Courts in India have, apart from and independent of the provisions contained in the Code, followed the principles adopted by the Courts of Equity and allowed a set-off even in respect of an unascertained sum in the nature of cross-demands arising out of the same transaction, or if they are so connected in their nature and circumstances that they can be looked upon as one transaction. But it is necessary that the claim to set-off must be within limitation on the

date on which the written statement was presented. An equitable set-off cannot be claimed as of right and the court has a discretion to refuse to allow it. If a protracted enquiry is necessary for determination of the sum due, it may be a ground for refusing it. In allowing such a claim to be raised, the court is entitled to put the defendant on such terms as it thinks reasonable and proper. (*Gulla v. Premsukhdas*, 1954 R. L. W. 749).

In the case of damages, set-off can be allowed only by way of equity and it is in the discretion of the court. It is essential for a party claiming an equitable set-off that the cross-demands should arise out of the same transaction. Where the plaintiff bases his case on a contract and the defendant's claim is for damages not arising from the same transaction nor connected with it, the defendant is not entitled to claim an equitable set-off. (*Narising Rao Ramkrishnayya v. Veerayya Rajanna*, I. L. R. 1952 Hyd. 1041). Claim of damages by way of a set-off being in the nature of an equitable set-off, court-fee is payable thereon.

The provisions of O. 8, r. 6, are, therefore, not exhaustive because apart from a legal set-off an equitable set-off can be pleaded independently of the specific provisions of the Code.

As a result of a series of decisions of the Courts in India there emerge the following propositions of law with regard to equitable set-off.

1. An equitable right of set-off exists in this country when both the claim of the plaintiff and that of the defendant arise out of the same transaction.
2. The law of equitable set-off applies where the cross-claims, though not arising out of the same transaction, were closely connected together.
3. In order that a claim for equitable set-off may arise, it is not sufficient that there are cross-demands: it is further necessary that there should be a connection between them which makes it inequitable to drive the defendant to a separate suit—as when the demands arise out of the same transaction or when there is on each side knowledge of and confidence in one debt discharging the other.

LEGAL AND EQUITABLE SET-OFF

The distinction between legal and equitable set-off may now be noted :

1. In a legal set-off the amount claimed must be an ascertained sum of money, but in an equitable set-off the claim must be allowed even with respect to an unascertained sum of money.

2. In a legal set-off the court is bound to entertain and adjudicate upon the plea when raised. In the case of an equitable set-off, however, it is not obligatory on the court to adjudicate upon it and the defendant cannot claim it as a matter of right. The court has the discretion to refuse to take notice of the equitable set-off if the investigation into the equitable claim is likely to result in delay.

3. In a legal set-off it is not necessary that the cross-demands arise out of the same transaction, but an equitable set-off is allowed only when the cross-demands arise out of the same transaction as the plaintiff's claim.

4. In a legal set-off the amount claimed to be set-off must be legally recoverable and not barred by limitation at the date of the suit, but a claim by

way of equitable set-off can be allowed even if it is barred at the date of the suit where there is a fiduciary relationship between the plaintiff and the defendant.

5. If the defendant's claim is barred at the date of the written statement but not barred at the date of the suit, the defendant can get an equitable set-off to the extent of the plaintiff's claim only but not for the balance found due to him. In a legal set-off the whole claim is admissible and the defendant can even get a decree for the balance.

6. A legal set-off requires a court-fee because it is a claim that might be established by a separate suit in which a court-fee would have to be paid. But there is no such fee required in an equitable set-off which is for an amount that may equitably be deducted from the claim of the plaintiff where a court-fee has been paid on the gross amount. (*Madan Mohan Garg v. Bohra Ram Lal*, 1934 A. L. J. 421).

Counter claim by defendant.—A defendant in a suit may, in addition to his right of pleading a set-off under r. 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not; provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the court. Such counter-claim shall have the same effect as a cross-suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim. The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the court. The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. (O. 8, r. 6 A).

The plaintiff may object to the disposal of the claim by way of counter-claim by pleading for its disposal by an independent suit, and he may, at any time before issues are settled in relation to the counter-claim, apply to the court for an order that such counter-claim may be excluded, and the court may, on the hearing of such application, make such order as it thinks fit. (O. 8, r. 6C).

If the plaintiff makes default in putting in a reply to the counter-claim made by the defendant, the court may pronounce judgment against the plaintiff in relation to the counter-claim made against him, or make such order in relation to the counter-claim as it thinks fit. (O. 8, r. 6E).

Where in any suit a set-off or counter-claim is established as a defence against the plaintiff's claim, and any balance is found due to the defendant, as the case may be, the court may give judgment to the party entitled to such balance. The rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim. (O. 8, rr. 6F and 6G).

SET-OFF AND COUNTER-CLAIM

The distinction between set-off and counter-claim may now be noted :

(1) Set-off must be for an ascertained sum or must arise out of the same transaction as the plaintiff's claim; a counter-claim, however, need not arise out of the same transaction.

possession or power documents other than those set forth in his affidavit. The only case in which the court may require a party to make a further and better affidavit of documents is (i) where it appears from the affidavit itself, or from the documents disclosed therein, or from the pleadings, that the party has other documents in his possession or power; (ii) where the party ordered to make affidavit of documents has misconceived his case so that the court is practically certain that if he had acted on a proper view of the law he would have disclosed further documents.

AFFIDAVITS

(Sections 30 and 139 and Order XIX)

The Court may at any time, either of its own motion or on the application of any party, order that any fact may be proved by affidavit or that the affidavit of any witness may be read at the hearing, on such conditions as it thinks reasonable, unless either party *bona fide* desires to produce him for cross-examination, and such witness can be produced. [S. 30 (c) and O. 19, r. 1.]

Upon any application evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent, unless he is exempted from personal appearance in court (O. 19, r. 2).

Matters to which affidavits shall be confined.—An affidavit must contain only facts known to the deponent or information which he believes to be correct. Rule 3 of Order 19 states that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory application, on which statement of his belief may be admitted, provided that the grounds thereof are stated.

Oath Commissioners.—Any court or magistrate, an officer or other person whom a High Court may appoint in this behalf, or any officer appointed by any other court empowered by the State Government may administer the oath to the deponent. (S. 139).

PROCEDURE IN SUITS DURING HEARING

(Order IX)

Appearance of Parties and Consequence of Non-appearance

Parties to appear on day fixed in summons.—On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the court-house in person or by their respective pleaders. The suit shall then be heard unless adjourned to a future day fixed by the court. (O. 9, r. 1)

What O. 9, r. 1, contemplates is that the date for appearance given in the summons served on the defendants is the date fixed for the hearing of the case, but the hearing may be adjourned from time to time. [A. I. R. 1932 Pat. 338].

Dismissal of suit.—The court may dismiss the suit on that day if (1) the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges chargeable for

such service or to present copies of the plaint or concise statements, as required by r. 9 of O. 7 ; provided that no such order shall be made if, notwithstanding such failure, the defendant attends in person (or by agent when he is allowed to appear by agent) on the day fixed for him to appear and answer ; (2) the plaintiff has failed to comply with the rules for filing the copy of the plaint for service on the defendant (amendment made by the Allahabad High Court) ; and (3) where neither party appears when the suit is called on for hearing [O. 9, rr. 2 and 3].

Under O. 9, r. 2, C. P. C. a suit can be dismissed only if the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges, if any, chargeable for such service. Where the plaintiff had deposited process fee, and the only thing that was required of him was to file a summons to the Collector, his failure to file the summons in reasonable time does not entail dismissal of his suit under O. 9, r. 2. [I. L. R. (1952) 2 Raj. 582].

Remedy where suit is dismissed under rr. 2 and 3 above.—Where a suit is dismissed under rules 2 and 3 above, the plaintiff may (subject to the law of limitation) (a) bring a fresh suit or (b) apply for an order to set the dismissal aside. The court shall set aside the dismissal on being satisfied that there was sufficient cause for the plaintiff not paying the court-fee and postal charges or presenting requisite copies of the plaint or concise statements within the time fixed for the issue of the summons or for his non-appearance. [O. 9, r. 4].

Dismissal of suit where plaintiff fails to apply for fresh summons.—Where, after a summons has been issued to the defendant and returned unserved, the plaintiff fails, for a period of one month from the date of the return, to apply for the issue of a fresh summons, the court shall dismiss the suit as against such defendant, unless the plaintiff has satisfied the court that—

- (a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or
- (b) such defendant is avoiding service of process, or
- (c) there is any other sufficient cause for extending the time.

Where a suit is dismissed under the above circumstances the plaintiff may (subject to the law of limitation) bring a fresh suit. [O. 9, r. 5].

Procedure where only plaintiff appears.—Where the plaintiff appears and the defendant does not appear on the date of hearing of the suit, then—(a) if it is proved that the summons was duly served the court may make an order that the suit be heard *ex parte* ; (b) if it is not proved that the summons was duly served, the court shall direct a second summons to be issued and served on the defendant ; and (c) where the summons though served on the defendant was not in sufficient time to enable him to appear and answer on the date fixed in the summons, the court shall adjourn the hearing of the suit. [O. 9, r. 6].

Procedure where only defendant appears.—Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall dismiss the suit, unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree accordingly. [O. 9, r. 8].

On such dismissal of the suit, the plaintiff is precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside. The court shall, after issuing notice of the

application to the other side and on being satisfied that there was sufficient cause for non-appearance, set the dismissal aside on payment of costs or on other terms as it thinks fit. [O. 9, r. 9].

An application for restoration of the suit dismissed for default must be made within 30 days of the order or knowledge of the decree, under Art. 123 of the Limitation Act, 1963. The court has no jurisdiction to enlarge the period.

Where a previous suit against three defendants was dismissed in default of appearance of the plaintiff on the date of hearing but in the presence of defendant 1 only, a subsequent suit against the same defendants on the same cause of action is not barred by the provisions of O. 9, r. 9, C. P. C. against all the three defendants but only so far as defendant 1 is concerned. The dismissal of the previous suit as against the absentee defendants 2 and 3 should be taken to be one under O. 9, r. 3 so as to enable the plaintiff to bring a fresh suit as against defendants 2 and 3 by virtue of O. 9, r. 4, while the suit against the present defendant should be treated as dismissed under O. 9, r. 8, only so as to enable him to set up the bar under O. 9, r. 9. The prohibition in O. 9, r. 9, which disables the plaintiff from bringing the suit is limited, therefore, to the suit that was dismissed under r. 8 as against the defendant who was present at the hearing and it does not reach to those defendants who were absent when the case was called.

The terms of O. 9 are all part of the procedural enactments and while construing them an attempt should be made to further the remedy and suppress the mischief. To the extent the defendant who was present and as such prepared to further the progress of the case and the plaintiff was absent, the law inhibits any fresh action; to the extent however the defendant was absent, it is plain that the same said result is neither contemplated nor can be canvassed even on equitable grounds for the defendant was also in default. Though the cause of action may be same, the earlier dismissal clearly is not *res judicata*. It is still a dismissal in default of the plaintiff and in the presence of a given defendant. There can be dismissal of suit by the same order both under r. 8, as well as r. 3. (*Venutai Motiram Ghongde v. Sadashiv Parashramji Madghe*, A. I. R. 1975 Bom., 68).

Effect of dismissal.—Subject to an application for restoration the dismissal operates as a final adjudication. But a party is not precluded by reason of such dismissal from raising his claim by way of defence in another suit.

Appeal against rejection of an application for restoration of the suit.—Order 43, r. 1 provides that an appeal lies from an order under rule 9 of Order 9 rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit.

Ex parte decree.—An *ex parte* decree is a decree passed in the absence of the defendant. Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing then, if it is proved that the summons was duly served, the court may proceed *ex parte*, i. e., proceed to take and determine on evidence, and pass a decree in favour of the plaintiff if a *prima facie* case is made out by him. [O. 9, r. 6 (1) (a)]. An *ex parte* decree may be passed either at the first hearing or at an adjourned hearing.

Setting aside ex parte decree.—In order to have an *ex parte* decree set aside the defendant must apply to the court by which the decree was passed

for an order to set it aside and satisfy it either that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. On being satisfied the court shall make an order setting aside the decree as against the defendant applying or all the defendants, if it is of such a nature that it cannot be set aside against the applicant only, upon such terms as to costs as it thinks fit. [O. 9, r. 13].

The proviso to rule 13 further lays down that no court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

The explanation added to rule 13 provides that where there has been an appeal against a decree passed *ex parte* under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that *ex parte* decree.

The only two grounds mentioned in the above rule for setting aside the *ex parte* order are that the defendant had not been actually served with the summons of the suit or, in spite of service, the defendant was prevented by any sufficient cause from appearing at the date of hearing. The onus of proving 'not duly served' is on the applicant. The rule can have no application where the defendant refuses the summons. Sufficient cause must be other than lack of knowledge of the proceedings. The question to be considered in such cases is whether the defendant honestly intended to be present at the hearing and did his best to do so.

The merits of a case shall not form an element for consideration in disposing of an application to set aside a dismissal for default. Nor should the trial court set aside an *ex parte* decree for the ends of justice where it is satisfied that there was no sufficient cause for the non-attendance of the party. If an *ex parte* decree is set aside in contravention of the above provisions it will amount to a material irregularity and the order is liable to be set aside in revision.

Limitation.—The period of limitation for the filing of an application to set aside an *ex parte* decree is 30 days for the date of the passing of the decree, or the date on which the applicant had knowledge of the decree when the summons was not duly served. (Art. 123, Limitation Act, 1963). But in the latter case the onus is on the defendant to prove that it was presented within 30 days of his having knowledge of the decree.

The rule of procedure prescribed in O. 9, r. 13, is, therefore, dependent upon, and unequivocally connected with, Art. 123, Limitation Act, 1963.

[The mere filing of an application for setting aside an *ex parte* decree or for restoration of the appeal does not render the appeal *sub judice*.]

No decree shall be set aside on any such application unless notice thereof has been served on the opposite party [O. 9, r. 14].

Remedies open to parties in case of dismissal of suits.

1. Where neither party appears when the suit is called on for hearing and the court dismisses the suit.—The plaintiff may either bring a fresh suit, or may apply to the court for the setting aside of the order of dismissal,

2. Remedies in case of *ex parte* decree, i. e., where the plaintiff appears and the defendant does not appear and an *ex parte* decree is passed in favour of the plaintiff on proving the service of summons on the defendant and on his proving the case.—Where an *ex parte* decree is passed against the defendant he may (a) prefer an appeal to a higher court under S. 96 (2) ; or (b) apply for a review of judgment to the court which passed the decree under S. 114, or (c) apply for the setting aside of the decree under O. 9, r. 13, to the court which passed the decree on either of the two grounds, viz. that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. A revision application also lies against the order dismissing a petition under O. 9, r. 13.

3. Where the defendant appears and the plaintiff does not appear and the court dismisses the suit.—The remedy open to the plaintiff is (a) to apply for the setting aside of the order of dismissal or (b) to apply for a review of judgment under O. 47, r. 1. The plaintiff is precluded from bringing a fresh suit in respect of the same cause of action.

4. Where an *ex parte* decree is alleged to have been obtained by the plaintiff by fraud, the defendant may institute a regular suit to set aside the *ex parte* decree on the ground of fraud.

Examination of Parties by the Court [Order X]

In order to clarify the pleadings with a view to proceed with the trial of the suit more intelligently the court has to ascertain from each party or his pleader at the first hearing of the suit whether he admits or denies such allegations of fact as are made in the plaint or written statement of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made and will record such admissions and denials. (O. 10, r. 1).

At the first hearing of the suit, the court—(a) shall, with a view to elucidating matters in controversy in the suit, examine orally such of the parties to the suit appearing in person or present in court, as it deems fit ; and (b) may orally examine any person, able to answer any material question relating to the suit, by whom any party appearing in person or present in court or his pleader is accompanied. At any subsequent hearing, the court may orally examine any party appearing in person or present in court, or any person able to answer any material question relating to the suit, by whom such party or his pleader is accompanied. The court may, if it thinks fit, put in the course of an examination under this rule questions suggested by either party. (O. 10, r. 2).

The substance of the examination is reduced to writing by the judge and forms part of the record. [O. 10, rr. 1 to 3].

Where the party's pleader refuses or is unable to answer material questions, the court can direct personal attendance of the party himself. If the party fails without lawful excuse to appear in person on the appointed date, the court may pronounce judgment against him or make such order as it thinks fit. (O. 10, r. 4).

The object of the above rules is to clear up the obscure points by getting information and to get admissions to narrow down the issues. It is only when the party's pleader refuses or shows inability to answer material ques-

tions that the court can insist on personal attendance of a party by assigning reasons under rule 4 above. A court cannot insist on personal attendance of a party who is a *purdanashin* lady.

Admissions

[Order XII]

Any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party. Either party may call upon the other party to admit, within 15 days from the date of service of the notice, any document, saving all just exceptions. (O. 12, rr. 1 and 2). Every document which a party is called upon to admit, if not denied specifically or by necessary implication, or stated to be not admit, admitted in the pleading of that party or in reply to the notice to admit documents, shall be deemed to be admitted except as against a person under disability. (O. 12, r. 2 A). Notwithstanding that no notice to admit documents has been given, the court may, at any stage of the proceeding before it, of its own motion, call upon any party to admit any document and shall, in such a case, record whether the party admits or refuses or neglects to admit such document. (O. 12, r. 3-A). Any party may, by notice in writing at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, and specific fact or facts mentioned in such notice. (O. 12, r. 4). Where admissions of fact have been made, either on the pleading or otherwise, whether orally or in writing, the court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order, or give such judgment, as it may think fit having regard to such admissions. (O. 12, r. 6).

Production, Impounding and Return of Documents

[Order XIII]

The parties or their pleaders have to produce at the first hearing of the suit all the documentary evidence of every description in their possession or power, on which they intend to rely, and no documentary evidence shall be received at any subsequent stage of the proceedings unless good cause is shown for the non-production thereof. (O. 13, rr. 1 and 2).

On every document so admitted in evidence in the suit there shall be endorsed (a) the number and title of the suit, (b) the name of the person producing the document, (c) the date on which it was produced, and a statement of its having been so admitted. The endorsement shall be signed by the judge. (O. 13, r. 4).

Where a document admitted in evidence in the suit is an entry in a letter-book or a shop-book or other account in current use the party may furnish a copy of the entry, and the court after causing the copy to be examined, compared and certified mark the entry and return the book to the person producing it. (O. 13, r. 5).

The court may reject irrelevant or inadmissible document after stating the grounds of rejection. The endorsement on the rejected document shall show the particulars in clauses (a), (b) and (c) of rule 4 above, together with a statement of its having been rejected, and bear the initial of the judge. (O. 13, rr. 3 and 6).

Impounding of Documents.—The court may for sufficient cause direct any document or book produced before it in any suit to be impounded for any period and kept in the custody of an officer of the court. (O. 13, r. 8).

Return of admitted documents.—The document so admitted shall on application be returned to the party in a suit where no appeal is allowed after the suit has been disposed of and in a suit where an appeal is allowed after the appeal has been disposed of or after the expiry of the period of limitation, if no appeal has been filed. The document may be returned at any time earlier if the person applying therefor delivers to the proper officer for being substituted for the original—(i) in the case of a party to the suit, a certified copy, and (ii) in the case of any other person, an ordinary copy, which has been examined, compared and certified. (O. 13, r. 9).

The court may send for, either from its own records or from any other court, the record of any other suit or proceeding and inspect the same where such record is material to the suit and the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record. But the court will not use in evidence any document which under the law of evidence would be inadmissible in the suit. (O. 13, r. 10).

✓ / Settlement of issues and determination of suit on
Issues of Law or on Issues agreed upon
[Order XIV]

Importance of Issues.—The issues are the backbone of a suit. The importance of defining at the outset the points on which a decision must turn cannot be too strongly emphasised. This, no doubt, requires thought and care, but the time is well spent, for vague and general issues for the most part mean that the case is approached without a clear idea of its essentials. By framing issues each side is fully aware of the exact questions to be tried and facilitates him to produce evidence germane to the issues.

Framing of issues.—Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other.

Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. Each material proposition affirmed by one party and denied by the other forms the subject of a distinct issue.

Issues are of two kinds—(a) issues of fact and (b) issues of law.

There is yet another kind of issue, which is a mixed issue of law and fact.

It is the duty of the court under sub-rule (5) of rule 1 of Order 14, to ascertain at the first hearing of the suit, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, the material propositions of fact or law on which the parties are at variance and thereafter to frame and record the issues on which the decision of the case depends.

The court is not required to frame and record issues if the defendant at the first hearing of the suit makes no defence.

Materials from which issues may be framed.—The court may frame the issues from all or any of the following materials :

(a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties ;

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit ;

(c) the contents of documents produced by either party. (O. 14, r. 3).

The court may examine witnesses or documents before framing issues where it is of opinion that the issues cannot be correctly framed without such examination. (O. 14, r. 4).

Issues of law and of fact.—Notwithstanding that a case may be disposed of on a preliminary issue, the court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues. [O. 14, r. 2 (1)]. Where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to—(a) the jurisdiction of the court, or (b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue. (O. 14, r. 2). Where the decision rests in the first place on a preliminary issue of jurisdiction, and the court is of the opinion that the case may be disposed of on that issue, the court has no option but to decide that issue first.

Disposal of the suit at the first hearing

[Order XV]

1. Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the court may at once pronounce judgment. (O. 15, r. 1).

2. Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants. (O. 15, r. 2).

3. Where the parties are at issue on some question of law or of fact, and issues have been framed by the court, if the court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit :

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects. (O. 15, r. 3).

Where a statement made by a party's pleader contains an admission of facts sufficient to dispose of the case the court may at once proceed to pro-

nounce judgment on such admission under rules 1 and 3 of O. 15. (*Kundibai v. Vishinji*, 228 I. C. 75).

The judge cannot dispose of the case at the first hearing when the summons is issued for settlement of issues only, and the pleader objects to such disposal.

4. Where the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence which he relies, the court may at once pronounce judgment. (O. 15, r. 4).

Summoning and Attendance of Witnesses

[Ss. 31-32 & Order XVI]

31. Summons to witness.—The provisions in sections 27, 28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects.

The rules relating to service of summons issued to the defendant and proof of service also apply to summonses to witnesses to give evidence or to produce documents or other material objects.

On or before the date appointed by the court, and not later than 15 days after the date on which the issues are settled, the parties shall present in court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summonses to such persons for their attendance in court. The court may, for reasons to be recorded, permit a party to call any witness, other than those whose names appear in the list, if such party shows sufficient cause for the omission to mention the name of such witness in the said list. The parties may obtain, on application to the court, summonses to persons whose attendance is required either to give evidence or to produce documents. (O. 16, r. 1).

Subject to the above, any party to the suit may, without applying for summons under r. 1, bring any such person, whose name appears in the list, to give evidence or to produce documents. (O. 16, r. 1-A). Before the summons is granted the parties shall pay into court such a sum of money as appears to it to be sufficient to defray the travelling and other expenses of the person summoned. In case any expert is summoned, the court may allow him reasonable remuneration for his time occupied in the case. Where the summons is served directly by the party on a witness, the expenses shall be paid to the witness by the party or his agent. The sum so paid into court shall be tendered to the person summoned at the time of serving the summons. (O. 16, rr. 2-3).

A person may also be summoned to produce a document without being summoned to give evidence and that person will be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same. (O. 16, r. 6).

32. Penalty for default.—The court may compel the attendance of any person to whom a summons has been issued under section 30 and for that purpose may—

(a) issue a warrant for his arrest ;

- (b) attach and sell his property ;
- (c) impose a fine upon him not exceeding five hundred rupees ;
- (d) order him to furnish security for his appearance and in default commit him to the civil prison.

The court has power to enforce the attendance of any person to whom a summons has been issued and for that purpose may (a) issue a warrant, with or without bail, for his arrest ; (b) attach and sell his property ; (c) impose a fine upon him not exceeding Rs. 500 : or (d) order him to furnish security for his appearance and in default commit him to the civil prison.

The court may, where a person to whom a summons has been issued fails to comply with it without lawful excuse, issue a proclamation requiring him to attend at a time and place named therein before inflicting the penalties mentioned above.

No court of small causes shall, however, make an order for the attachment of immovable property. (O. 16, r. 10).

The orders imposing a fine or directing issue of warrant for arrest are appealable under S. 104 (h).

Where the person appears after the attachment of his property and satisfies the court that he did not fail to comply with the summons without lawful excuse or did not intentionally avoid service, or that he had no notice of the proclamation, the court may release the property from attachment.

If the person, however, does not appear or appears but fails to satisfy the court, the court may impose upon him fine not exceeding Rs. 500, having regard to his condition in life and the circumstances of the case and attach and sell his property for the recovery of the same. (O. 16, rr. 11 and 12).

When witnesses may depart.—A person so summoned and attending shall, unless the court otherwise directs, attend at each hearing until the suit has been disposed of. (O. 16, r. 16).

No witness shall be ordered to attend in person to give evidence unless he resides (a) within the local limits of the court's ordinary original jurisdiction, or (b) without such limits but at a place less than one hundred or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the court is situate) less than 500 miles distance from the court house ; provided that where transport by air is available between the two places mentioned in this rule and the witness is paid the fair by air, he may be ordered to attend in person. (O. 16, r. 19).

Consequence of refusal of party to give evidence.—Where any party to a suit present in court refuses, without lawful excuse, when required by the court, to give evidence or to produce any document then and there in his possession or power, the court may pronounce judgment against him or make such order in relation to the suit as it thinks fit. (O. 16, r. 20).

**Attendance of Persons confined or Detained in Prisons
(Order XVI-A)**

Power to require attendance of prisoners to give evidence.--Where it appears to a court that the evidence of a person confined or detained in a prison within the State is material in a suit, the court may make an order requiring the officer in charge of the prison to produce that person before the court to give evidence ; provided that, if the distance from the prison to the court-house is more than 25 kilometres, no such order shall be made unless the court is satisfied that the examination of such person on commission will not be adequate. (O. 16-A, r. 2). Before making an order under r. 2, the court shall require the party at whose instance or for whose benefit the order is to be issued, to pay into court such sum of money as be sufficient to defray the expenses of the execution of the order, including the travelling and other expenses of the escort provided for the witness. (O. 16-A, r. 3).

The State Government may, at any time, by general or special order, direct that any person or class of persons shall not be removed from the prison in which he or they may be confined or detained, and thereupon, so long as the order remains in force, no order made under r. 2 shall have effect in respect of such person or class of persons. [O. 16, r. 4 (1)]. Before making an order under sub-r. (1), the State Government shall have regard to (a) the nature of the offence for which the person or class of persons have been ordered to be confined or detained in prison, (b) the likelihood of the disturbance of public order if the person or class of persons is allowed to be removed from the prison ; and (c) the public interest generally. [O. XVI-A, r. 4 (2)].

Adjournments

(Order XVII)

The court may, for sufficient cause, grant time to the parties and adjourn the hearing of the suit on payment of such costs as it thinks fit. But (a) when the hearing of evidence has once begun it shall be continued from day to day until all the witnesses in attendance have been examined, unless for the exceptional reasons to be recorded the court finds the adjournment of the hearing beyond the following day to be necessary ; (b) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of the party ; (c) the fact that the pleader of a party is engaged in another court, shall not be a ground for adjournment ; (d) where the illness of a pleader or his inability to conduct the case for any reason, other than his being engaged in another court, is put forward as a ground for adjournment, the court shall not grant the adjournment unless it is satisfied that the party applying for adjournment could not have engaged another pleader in time ; (e) where a witness is present in court but a party or his pleader is not present or the party or his pleader, though present in court, is not ready to examine or cross-examine the witness, the court may, if it thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be, by the party or his pleader not present or not ready as aforesaid. (O. 17, r. 1).

Where on the adjourned date the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes mentioned in

Order 9 dealing with consequence of non-appearance of parties, discussed earlier at pages 113-117 ante or make such other order as it thinks fit. (O. 17, r. 2). The Explanation added to r. 2 provides that where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the court may, in its discretion, proceed with the case as if such party were present.

Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit for which time has been allowed, the court may notwithstanding such default,—(a) if the parties are present, proceed to decide the suit forthwith ; or (b) if the parties are, or any of them is, absent, proceed under r. 2 above. (O. 17, r. 3). To apply the procedure under O. 17, r. 3, C. P. C. there should be presence of both the elements, viz., (1) the adjournment must have been at the instance of a party, and (2) there must be materials on the record for the court to proceed to decide the suit. (*Ram Ratan v. Sughad Singh*, A. I. R. 1952 M. B. 46).

Rule 2 of O. 17 does not apply where no day has been fixed for the hearing, but applies where the hearing of a suit has been adjourned and on the adjourned date the parties or any of them fail to appear.

Rule 3 of Order 17 applies only to cases where the party concerned has satisfied the court as to the existence of any adequate reason for its not having done what it was directed to do.

Rules 2 and 3 are mutually exclusive and where the pleader pleads no instructions and the party is not prepared to go on rule 2 and not rule 3 applies. Rule 3 means that the court has discretion to decide the case on the adjourned date or not, but if it does decide the suit, it will be a decision on the merits and appearance on behalf of the defendant would be assumed, whether he was in fact present or not and the decree cannot be regarded as *ex parte* (*Sheo Pujan Kalwar v. Bishnath Kalwar*, 1939 A. L. J. 627). Only an appeal and no revision lies against an order under O. 17, r. 3. (*Gaura Bibi v. Ghasitiya*, 8 A. L. J. 1265).

Where on an adjourned date, a case is decided in the absence of the defendant and the order is described as an *ex parte* one, it cannot be said that merely because the court gave some reasons for his decision, it becomes a decision on merits so as to take the case out of the provisions of O. 9.

Where on the refusal of an application for adjournment the plaintiff's pleader reports "No instructions" and the plaintiff though present during the defendant's arguments asks for time to engage another pleader which is refused, the trial judge should, in such circumstances, pass an order dismissing the suit for default under rule 2 and not purport to pass a decree based on a finding on the merits against the plaintiff under rule 3.

The remedies in the case of orders under r. 2 and r. 3 are different. If a suit is dismissed under O. 17, r. 2, read with O. 9, r. 8 (*i. e.* where the defendant appears and the plaintiff does not appear), the remedy is by application under O. 9, r. 9, *i. e.*, the plaintiff is precluded from bringing a fresh suit in respect of the same cause of action but he may apply for restoration of the suit. But if the suit is dismissed under O. 17, r. 3, the remedy is by way of an appeal. (*Chandramathi v. Narayanswami*, 33 M. 241 ; *Latta v. Nand*, 22 A. 66, F. B.).

Where there is default under both the rules, *i. e.*, the party having got an adjournment not only fails to perform the act for which adjournment was given but also fails to appear on the adjourned date, r. 2 should be applied. (*Ganesh v. Debi*, A. I. R. 1925 Alld. 267), but if there are materials to justify a decision on 'merits' r. 3 should be resorted to. (*Enatullah v. Jiban*, 41 C. 956).

If the suit came to be disposed of on account of the non-appearance of the plaintiff on a hearing day but it was not at the instance of the plaintiff that the suit was adjourned for the day it came to be disposed of, the court can proceed only under Order 17, r. 2 in one of the modes prescribed by Order 9, presumably in the manner prescribed by Order 9, rule 8. An application under O. 9, r. 9 by the plaintiff would be maintainable in such a case.

HEARING OF THE SUIT AND EXAMINATION OF WITNESSES

[Order XVIII]

Right to begin.—As a rule the plaintiff has to prove his case and therefore must begin. But if the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, the defendant has the right to begin. Similarly, if on the issue or issues of fact the burden of proof is on the defendant, it is the defendant who has the right to begin. In a suit for restitution of conjugal rights, where the marriage is admitted but coercion and non-consent is pleaded or in a suit where the defendant pleads minority, it is the defendant who has to begin first. [O. 18, r. 1].

Statement and production of evidence.—The party having the right to begin states his case on the date fixed for the hearing of the suit and produces his evidence in support of the issues which he is bound to prove. The other party states his case and produces his evidence and addresses the court generally on the whole case. The party beginning may then reply generally on the whole case. Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party. (O. 18, rr. 2 and 3).

Where the party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the court, for reasons to be recorded, permits him to appear as his own witness at a later stage. [O. 18, r. 3A).

The evidence of witnesses shall be taken orally in open court in the presence and under the personal direction and superintendence of the Judge. (O. 18, r. 4). In cases in which an appeal is allowed, the evidence of each witness shall be,—(a) taken down in the language of the court (i) in writing by, or in the presence and under the personal direction and superintendence of, the judge ; or (ii) from the dictation of the judge directly on a typewriter ; or (b) if the judge, for reasons to be recorded, so directs, recorded mechanically in the language of the court in the presence of the judge. [O. 18, r. 5). Where the evidence is taken down in a language different from that in which it is given, and the witness does not understand the language in which it is taken down, the evidence so recorded shall be interpreted to him in the language in which it is given. (O. 18, r. 6).

Memorandum of evidence.—In unappealable cases it is not necessary to take down the evidence of the witnesses in writing at length, but the Judge may, as the examination of each witness proceeds, make a memorandum of the substance of what he deposes. In other cases also where the evidence is not taken down in writing by the Judge or from his dictation in open court, or recorded mechanically in his presence, he shall be bound to make a memorandum of the substance of what each witness deposes. Such memorandum shall be written and signed by the Judge and shall form part of the record. (O. 18, rr. 13 and 8).

Where English is not the language of the court, but all the parties to the suit who appear in person, and the pleaders of such of the parties as appear by pleaders, do not object to having such evidence as is given in English being taken down in English, the judge may so take it down or cause it to be taken down. [O. 18, r. 9 (1)]. Where evidence is not given in English but all the parties who appear in person, and the pleaders of such of the parties as appear by pleaders, do not object to having such evidence being taken down in English, the judge may take down, or cause to be taken down such evidence in English. [O. 18, r. 9 (2)].

The court may of its own motion or on the application of a party or his pleader take down any particular question and answer, or any objection to any question. Where any question put by a witness is objected to by a party or his pleader, and the court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the court thereon. (O. 18, r. 11).

Remarks on demeanour of witnesses.—The court may record such remarks as it thinks material respecting the demeanour of any witness while under examination. (O. 18, r. 12).

The court may at any stage of a suit recall a witness who has been examined and may put questions to him. (O. 18, r. 17).

Where a party satisfies the court that, after the exercise of due diligence, any evidence was not within his knowledge or could not be produced by him, at the time when that party was leading his evidence, the court may permit that party to produce that evidence at a later stage on such terms as may appear to it to be just. (O. 18 r. 17A).

Inspection.—The court may at any stage of a suit inspect any property or thing concerning which any question may arise, and where the court inspects any property or thing it shall make a memorandum of any relevant facts observed at such inspection and such memorandum shall form a part of the record of the suit. The object of local inspection is to enable the Judge to understand the evidence. The inspection should be made before arguments are heard. (O. 18, r. 18). An inspection under this rule is for the purpose of understanding the evidence and cannot be a substitute for evidence of the parties. [*Chandraram v. Bhoma*, I. L. R. (1952) 2 Raj. 54].

Power to deal with evidence taken before another Judge.—Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with the evidence or memorandum taken down or made as if such evidence or memorandum had been taken down or made by him and proceed with the suit from the stage at which his predecessor left. (O. 18, r. 15).

De bene esse examination.—It is the act of taking evidence for future use while it is available. Rule 16 of Order 18 lays down that where a witness is about to leave the jurisdiction of the court, or other sufficient cause is shown to the satisfaction of the court why his evidence should be taken immediately, the court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness. The evidence so taken shall be read over to the witness, and if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit. (O. 18, r. 16).

PROCEDURE IN SUITS AFTER HEARING

Judgment and Decree

[Order XX]

Judgment

33. Judgment and decree.—The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow.

Judgment.—The Court, after the case has been heard, shall pronounce judgment in open court, either at once, or as soon thereafter as may be practicable, on some future day, and when the judgment is to be pronounced on some future day, the court shall fix a day for that purpose, of which due notice shall be given to the parties or their pleaders [O. 20, r. 1(1)].

The provisos added to r. 1 state that where the judgment is not pronounced at once, every endeavour shall be made by the court to pronounce the judgment within fifteen days from the date on which the hearing of the case was concluded but, where it is not practicable so to do, the court shall fix a future day for the pronouncement of the judgment, and such day shall not ordinarily be a day beyond thirty days from the date on which the hearing of the case was concluded, and due notice of the day so fixed shall be given to the parties or their pleaders. Further, where a judgment is not pronounced within thirty days from the date on which the hearing of the case was concluded, the court shall record the reasons for such delay and shall fix a future day on which the judgment will be pronounced and due notice of the day so fixed shall be given to the parties or their pleaders. In order to avoid inordinate delay in delivery of judgments after the conclusion of the hearing of cases, a time-limit for the same has been fixed, and if the judgment is not delivered even within 30 days, the court shall be required to record the reasons for such delay and shall fix a future date for the pronouncement of the judgment after notice to the parties or their pleaders.

It is not necessary that the court should read out the whole judgment, but may only pronounce the result of the case or read the operative portion of the judgment, but a copy of the whole judgment shall be made available for the perusal of the parties or the pleaders immediately after the judgment is pronounced. [O. 20, r. 1 (2)]. The Judge is not expected to write his judgment before the finishing of the entire evidence and hearing the arguments of the counsel, and if he does so he commits a gross irregularity in the trial of the case. [*Mst. Kaushilya v. Arat Lal*, 1933 A. 196].

The judgment may be pronounced by dictation in open court to a shorthand writer if the judge is specially empowered by the High Court in this behalf, provided that, where the judgment is pronounced by dictation in open court, the transcript of the judgment so pronounced shall, after making such correction therein as may be necessary, be signed by the judge, bear the date on which it was pronounced, and form a part of the record. [O. 20, r. 1 (3).]

A Judge shall pronounce a judgment written but not pronounced by his predecessor. (O. 20, r. 2).

Contents of judgment.—Judgment of courts other than small causes shall contain (a) a concise statement of the case ; (b) the points for determination ; (c) the decision thereon ; and (d) the reasons for such decision. Judgments of a court of small cause need not contain more than (b) and (c), i. e., the points for determination and the decision. (O. 20, r. 4).

In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit. (O. 20, r. 5).

It is not sufficient for the trial court merely to state in its judgment that on a careful consideration of the evidence it has come to this or that conclusion. The material evidence on a particular issue for and against the parties to the suit must be set out in the judgment and reasons stated for its acceptance or rejection. (*Amber Ali v. Nichar Ali*, A. I. R. 1950 Assam, 79).

Order 20, r. 4, requires a court not only to state the points for determination and the decision thereon but also to give reasons for such a decision. In the case of findings of fact arrived at by a court of first appeal this is all the more necessary because those findings are binding on the court of second appeal and it is necessary that, if such matter comes before a court of second appeal, the court shall be able to judge whether the first appellate court has applied its mind to consideration of the evidence or not. (*Sabhray v. Mahesh Narain*, A. I. R. 1948 Oudh 27).

Where the judgment is extremely brief and unintelligible it is invalid. (*Harbhagwan v. Ahmed*, 1922 Lab. 122). Where the Judge has applied his mind to the points for determination and recorded his decision it is sufficient. But where the Judge does refer to the evidence and the judgment indicates that he failed to consider a material portion of the evidence the judgment can be assailed. (*Moolji Sicka & Co. v. The Bengal Nagpur Rly. Co. Ltd.*, 35 C. W. N. 1242.)

Judgments of a court of small causes need contain only the points for determination and the decision thereon. But where they are lacking the judgment is liable to be set aside. A judgment which is not intelligible and jumbles up all points together and contains a statement that all issues are found in plaintiff's favour does not meet even the requirement of the rule governing judgments of a court of small causes.

On a question of fact in a small cause suit the Judge need not give his reasons. He need set out only the points for decision and the decision thereon *seriatim*. But on a question of law he must set out so much of his reasons as will show the road by which he arrived at the decision. (*Tribhuwandas Manchharam v. C. R. Contractor's Company*, 210 I. C. 33).

Where the judgment in a small cause court's suit is not supported by the evidence as recorded and the evidence has not been recorded in such a way as to enable the High Court to form any opinion as to the respective cases of the parties before the court, and on what material circumstances the court has relied upon in support of the judgment, the judgment is liable to be set aside in revision.

Court to inform parties as to where an appeal lies in cases where parties are not represented by pleaders—Except where both the parties are represented by pleaders, the court shall, when it pronounces its judgment in a case subject to appeal, inform the parties present in court as to the court to which an appeal lies and the period of limitation for the filing of such appeal and place on record the information so given to the parties. (O.20, r. 5-A). In order to ensure that there is no dispute as to the nature of information given by the Court, the judge is required to place on record the precise nature of information given by the Court to the parties.

Last paragraph of judgment to indicate in precise terms the reliefs pround.—The last paragraph of the judgment shall state in precise terms the relief which has been granted by such judgment. Every endeavour shall be made to ensure that the decree is drawn up as expeditiously as possible, and, in any case, within fifteen days from the date on which the judgment is pronounced; but where the decree is not drawn up within the time aforesaid, the court shall if requested so to do by a party desirous of appealing against the decree, certify that the decree has not been drawn up and indicate in the certificate the reasons for the delay, and thereupon—

- (a) an appeal may be preferred against the decree without filing a copy of the decree and in such a case the last paragraph of the judgment shall, for the purposes of r. 1 of O. 41, be treated as the decree; and
- (b) so long as the decree is not drawn up, the last paragraph of the judgment shall be deemed to be the decree for the purpose of execution and the party interested shall be entitled to apply for a copy of that paragraph only without being required to apply for a copy of the whole of the judgment; but as soon as a decree is drawn up, the last paragraph of the judgment shall cease to have the effect of a decree for the purpose of execution or for any other purpose; provided that where an application is made for obtaining a copy of only the last paragraph of the judgment, such copy shall indicate the name and address of all the parties to the suit. (O. 20, r. 6-A).

Copies of typewritten judgments when to be made available.—Where the judgment is type-written, copies of the type-written judgment shall, where it is practicable so to do, be made available to the parties immediately after the pronouncement of the judgment on payment by the party applying for such copy of such charges as may be specified in the rules made by the High Court. (O. 20, r. 6-B).

Alteration of judgement.—The judgment shall be dated and signed by the Judge in open court at the time of pronouncing it, and, when once signed, shall not afterwards be altered or added to, save (1) (a) clerical or arithmetical mistakes; or (b) errors arising from any accidental slip or omission (S. 152); or (2) on reveiw (S. 114).

Except within the well-known limits where a court can exercise its inherent jurisdiction, there is no inherent jurisdiction in the court to rehear a case and alter or add to a judgment which has been duly pronounced and deliberately signed and sealed in accordance with law even with the consent of the parties. It follows that it is not competent to a judge who has once pronounced and signed the judgment to recall and alter that judgment at the request of either party. No such practice in derogation of law can grow up or be recognised. (*Allah Rabbul Almin v. Ganga Sshai*, 1947 A. L. J. 215).

In a civil case a judgment delivered in open court and dictated to a shorthand writer before the transcript of the same is signed by the Judge or Judges concerned does not amount to a final disposal of the case. Where the stage of dating and signing the judgment is not reached, the jurisdiction of the court to reconsider and to rehear the case continues. [*Beni Madho Prasad Singh v. Adit*, I. L. R. (1953) I All. 652].

Decree

Contents of decree.—The decree shall agree with the judgment; it shall contain (1) the number of the suit ; (2) the names and descriptions of the parties, their registered addresses ; (3) particulars of the claim ; (4) clear specification of the relief granted or other determination of the suit ; (5) the amount of costs incurred in the suit ; and by whom or out of what property and in what proportion such costs are to be paid ; (6) any direction as to the setting off of costs payable to one party by the other against any sum found to be due from the former to the latter ; (7) the date on which the judgment was pronounced ; and (8) the signature of the Judge. [O. 20, rr. 6 and 7].

Additional contents of decrees in particular cases

1. In a suit relating to *recovery of immovable property* the decree shall also contain a description of such property sufficient to identify the same, specifying the boundaries or numbers in the settlement record. (O. 20, r. 9).

2. A decree for *delivery of movable property* shall also state the amount of money to be paid as an alternative if delivery cannot be had. (O. 20, r. 10).

3. In a *decree for payment of money*, the court may for sufficient reason incorporate in the decree, after hearing such of the parties who had appeared personally or by pleader at the last hearing, before judgment, an order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest. [O. 20, r. 11 (1)].

But after the passing of a decree for the payment of money the court can subsequently order the postponement of the decretal amount or payment by instalments only on the application of the judgment-debtor, which must be made within six months from the date of the decree, and with the consent of the decree-holder. [O. 20, r. 11 (2)].

Each of the sub-rr. (1) and (2) of O. 20, r. 11, C. P. C. empowers the court to postpone payment of the decretal amount or to make it payable by instalments and provide for award of interest from the date of the decree or order. There is, therefore, no scope or need to resort to S. 34, in such cases, so far as the award of interest is concerned and the limitation as to rate of interest specified in S. 34 cannot be invoked where the court is acting under O. 20, r. 11, sub-r. (1) or (2).

Section 34 is a general provision dealing with the question of interest in a decree for the payment of money. Where therefore the court passes a decree without anything more, the rate at which the court can award interest on the principal sum from the date of the decree to the date of payment cannot exceed six per cent per annum. But where the court makes a decree and postpones payment of the decretal amount or makes it payable in instalments in exercise of its powers under O. 20, r. 11, the provision made in O. 20, r. 11 would govern the question of interest and not the provision under S. 34. [*Gordhandas Madhavji v. M/s. Va'onji Khestia Firm*, I. L. R. (1957) Guj. 183].

4. (a) A decree in a *pre-emption* suit, where the purchase-money has not been paid into court, shall specify a date on or before which the purchase-money shall be paid and direct that on payment into court of such purchase-money with costs the defendant shall deliver possession of the property to the plaintiff; but that if the payment is not made the suit shall be dismissed with costs.

(b) Where the court has adjudicated upon rival claims to pre-emption the decree shall direct (i) if the claims are equal in degree, that the claim of each pre-emptor shall take effect in respect of a proportionate share of the property; and (ii) if the claims decreed are different in degree, the claim of the inferior pre-emptor shall not take effect until the superior pre-emptor has failed to pay. [O. 20, r. 14].

5. In a decree where the defendant has been allowed a set off against the claim of the plaintiff, it shall state what amount is due to the plaintiff, and what amount is due to the defendant. [O. 20, r. 19].

Preliminary decree for possession and mesne profits.—In a suit for the recovery of possession of immovable property and for rent or mesne profits the court may pass a preliminary decree (a) for the possession of the property; (b) for the rents which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent; (ba) for the mesne profits or directing an inquiry as to such mesne profits; (c) directing an inquiry as to rent or mesne profits from the institution of the suit until (i) the delivery of possession to the decree-holder, (ii) the relinquishment of possession by the judgment-debtor, or (iii) the expiration of three years from the date of the decree, whichever event first occurs. [O. 20, r. 12 (1)].

Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry. [O. 20, r. 12 (2)].

Specific performance of contract.—Where a decree for the specific performance of a contract for the sale or lease or immovable property orders that the purchase-money or other sum be paid by the purchaser or lessee, it shall specify the period within which the payment shall be made. (O. 20, r. 12-A).

Normally there is no doubt that a successful plaintiff would be entitled to mesne profits for 3 years and not more. But where the court is dealing with a claim made by the plaintiffs on behalf of the trust and the decision in their favour has rendered it necessary to adjust equities between the trust and the respective alienees, alienations in whose favour have been set aside, as invalid, the court has jurisdiction to award mesne profits for more than 3 years by way of an equitable adjustment. (*Jana'kiram Iyer v. Nilakanta Iyer*, A. I. R. 1962 S. C. 633).

Final decree.—Where an inquiry is directed under clause (b) or (c) above a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry. (O. 20, r. 12).

Administration suit.—In a suit for an account of any property and for its due administration under the decree of the court the court shall, before passing the final decree, pass a preliminary decree ordering such accounts and inquiries to be taken and made.

If the property of a deceased person which is being administered by the court proves insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as may be in force with respect to the estate of insolvent persons ; and all persons entitled to be paid out of such property may come in under the preliminary decree. (O. 20, r. 13).

Dissolution of partnership.—In a suit for dissolution of a partnership, or the taking of partnership accounts, the court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved and directing accounts to be taken and other acts to be done. (O. 20, r. 15).

Account between principal and agent.—In a suit for an account of pecuniary transactions between a principal and an agent and in any other suit of like nature the court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken. (O. 20, r. 16).

Decree in partition suit.—In a decree passed in a suit *for the partition of property* or separate possession of a share therein, if the estate is assessed to the payment of revenue to the Government, the decree shall declare the rights of several parties interested in the property, but shall direct the partition or separation to be made by the Collector. But if it be any other immovable property or movable property and the partition or separation cannot conveniently be made without further inquiry, the court may pass a preliminary decree declaring the rights of the several parties interested in the property and giving further necessary directions. (O. 20, r. 18).

INTEREST

34. Interest.—(1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding six per cent. per annum as the Court deems reasonable on such principal sum, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such principal sum from the date of the decree to the date of payment or other earlier date, the

Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie.

Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent. per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions.

Explanation I: In this sub-section, "nationalised bank" means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970).

Explanation II: For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.

Section 34 has no application to interest prior to the institution of the suit, which is a matter of substantive law. It is concerned only with interest during the pendency of the suit and after the decree, which is in the discretion of the Court. The proviso added to S. 34 by the Amendment Act, 1976, increases the post-decretal interest in relation to a liability arising out of a commercial transaction. A commercial transaction means a transaction connected with the industry, trade or business of the party incurring the liability.

As regards the interest accrued due prior to the institution of the suit on the principal sum adjudged, which is outside the scope of the present section, the law is that if there is a stipulation for the payment of interest at a fixed rate the court must allow it up to the date of the suit, unless the rate is penal or excessive on account of the transaction being unfair, when the court may allow reasonable rate of interest. If there is no express stipulation for payment of interest, the plaintiff is not entitled to it except in the case of (a) mercantile usage, (b) statutory right to interest, as under S. 80 of the Negotiable Instruments Act when no rate of interest is specified in a promissory note or bill of exchange, the court shall award interest at 6 per cent. per annum from the date of the amount due and (c) implied agreement.

As regards interest due from the date of the suit to the date of the decree and that due from the date of the decree to the date of payment, that is governed by S. 34 mentioned above. The section applies where the decree is for a definite sum of money. It embraces also a claim to unliquidated damages. In money suits, therefore, the question of interest after the institution of the suit passes from the domain of contract into that of judgment and the court has a discretion as to the rate of interest. That discretion, however, is a judicial discretion to be exercised on proper judicial grounds and not arbitrarily.

The jurisdiction to provide interest in the decree notwithstanding the fact that there is no reference to it in the judgment, is one which is peculiar to money decree and the Courts are vested with such jurisdiction under S. 34, C. P. C. In the decree in a suit for the payment of money, the Court can, at its discretion, provide for the payment of reasonable interest on the principal adjudged (a) from the date of suit to the date of decree ; (b) in addition direct the payment of any interest adjudged on such principal sum for any period prior to the institution of the suit ; and (c) may also direct the payment of further interest at such rate not exceeding 6 per cent. as the Court deems reasonable on such principal sum from the date of the decree to the date of payment or such earlier date as the Court thinks fit.

A decree for payment of damages which is computed in terms of money is to be understood as a decree for payment of money for purposes of S. 34 and the Court has the discretion to award interest under heads (a) and (c) but not under head (b) as mentioned above. If interest prior to suit is awarded under (b) it would be damages over damages, which is not postulated by law. Even if the judgment is silent about the award of interest from the date of suit till the date of the decree, the decree which awards it cannot be attacked on the ground that it is *prima facie* at variance with the judgment. (*Union of India v. A. Venkataiah*, A. I. R. 1975 Mad. 119).

Interest in mortgage suits.—In a decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the court may order payment of interest to the mortgagee as follows :

(a) interest up to the date of the payment of the amount found due under the preliminary decree to be made by the mortgagor (i) on the principal amount found or declared due on the mortgage, at the rate payable on the principal or, where no such rate is fixed, at such rate as the court deems reasonable ; (ii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee up to the date of the preliminary decree, at the rate agreed between the parties, or, failing such rate, at such rate not exceeding six per cent. per annum as the court deems reasonable ;

(b) subsequent interest up to the date of realisation or actual payment on the aggregate of the principal sums specified in cl. (a) as calculated in accordance with that clause at such rate as the court deems reasonable. (O. 34, r. 11).

Costs

35. Costs.—(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.

Section 35 deals with costs. It provides that (1) the costs of and incident to all suits shall be in the discretion of the court; (2) the court shall have full power to determine by whom or out of what property and to what extent costs are to be paid; and (3) where costs are not to follow the event the court shall state its reasons in writing.

The object of awarding costs is to indemnify a party against the expenses incurred in successfully vindicating his rights. The section provides that the costs of suits and applications are in the discretion of the court. That discretion is very wide, but it has to be exercised judicially and on fixed principles. The general rule is that the successful party is entitled to costs unless he is guilty of misconduct, negligence or omission or unless there is some other good cause for not allowing costs. The same rule is expressed by the expression "costs follow the event," i. e., costs follow the result of the suit. The following are the main rules with regard to the provision of costs:

1. The general rule is that costs shall follow the event unless the court, for good reasons, otherwise orders.

Normally costs should follow the event and it is not the rule that costs should be left to be borne by the parties. [*Jugra Singh v. Jaswant Singh*, 1971 (1) S. C. J. 141].

2. Where a party successfully enforces a legal right and in no way misconducts himself, he is entitled to costs as of right.

3. Everything which is done by a party to increase the litigation and costs, i. e., raising unnecessary issues, is a good cause for depriving him of his costs.

4. A person wrongfully made a party should get his costs.

5. If a plaintiff succeeds only with regard to part of his claim and fails on important issues, he may be ordered to pay the whole costs of the suit to the defendant.

6. If the defence is common to all the defendants, separate costs are not to be awarded.

7. Orders for costs on any application should be made when the application is disposed of.

8. In case of unreasonable, vexatious and improper interrogatories the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

9. Where the plaintiff withdraws from a suit or abandons part of a claim without the permission of the court, he shall be liable for such costs as the court may award.

10. When a court refuses costs no separate suit for it is maintainable. Where costs are awarded in a decree an appeal lies for costs when (1) a question of principle is involved; (2) the order proceeds upon a misapprehension

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of fact or law ; (3) there has been no exercise of discretion in making the order as to costs ; or (4) when the order is erroneous in law and improper.

Decree for costs against benamidar.—A decree for costs against a *benamidar* is not *executable* against a beneficial owner. It is open to a defendant in a suit by a *benamidar* to ask the court to implead the real plaintiff and award him costs as against the real plaintiff. But if the defendant in such a suit does not adopt such a course, he cannot, after the termination of litigation, raise the question of costs by a separate suit.

Under S. 35, C. P. C., the court may in exceptional cases award costs even against a stranger to the litigation. The court of course will not, and cannot, award costs against a person without giving him an opportunity of being heard. (*Chander v. Manohar Lal*, 1942 A. L. J. 367, F. B.)

35-A. Compensatory costs in respect of false or vexatious claims or defences.—(1) If in any suit or other proceeding, including an execution proceeding but excluding an appeal or a revision, any party objects to the claim or defence on the ground that the claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if thereafter, as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court, if it so thinks fit, may, after recording its reasons for holding such claim or defence to be false or vexatious make an order for the payment to the objector by the party by whom such claim or defence has been put forward, of costs by way of compensation.

(2) No Court shall make any such order for the payment of an amount exceeding three thousand rupees or exceeding the limits of its pecuniary jurisdiction, whichever amount is less :

Provided that where the pecuniary limits of the jurisdiction of any court exercising the jurisdiction of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887, or under a corresponding law in force in any part of India to which the said Act does not extend, and not being a Court constituted under such Act or law, are less than two hundred and fifty rupees, the High Court may empower such Court to award as costs under this section any amount not exceeding two hundred and fifty rupees and not exceeding those limits by more than one hundred rupees :

Provided, further, that the High Court may limit the amount which any Court or class of Courts is empowered to award as costs under this section.

(3) No person against whom an order has been made under this section shall, by reason thereof, be exempted from any criminal liability in respect of any claim or defence made by him.

(4) The amount of any compensation awarded under this section in respect of a false or vexatious claim or defence shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence.

Section 35-A of the Code lays down the conditions under which the court may award compensatory costs in respect of false or vexatious claims or defences. There must be a suit or other proceeding, including an execution proceeding (but excluding an appeal) in which any party objects to the claim or defence on the ground that the claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward; and if thereafter as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the court, if it so thinks fit, may after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector by the party by whom such claim or defence has been put forward, of costs by way of compensation, to the extent of Rs. 1,000 or within the limits of its pecuniary jurisdiction whichever is less.

The court is entitled to award costs by way of compensation only in a case where the defendant objects that the claim is false or vexatious to the knowledge of the plaintiff and the same was ultimately found to be so false or vexatious. Then at the discretion of the court, the defendant can claim costs by way of compensation. The costs that are awarded thus are compensatory and not penal. Every dismissal of the suit need not necessarily be false or vexatious to the knowledge of the plaintiff. It has to be specifically found on the material placed before the court, and by assigning reasons that the claim was false or vexatious to the knowledge of the plaintiff and that in spite of the objection of the defendant he persisted in that and ultimately the court found that the claim was, to the knowledge of the plaintiff, vexatious or false. [*Kaza Sriramamurthy v. Andhra University, Waltair*, A I.R. 1966 Andh. Pra. 179].

Compensatory costs can be awarded even against a co-defendant who has instigated the plaintiff to put forward a false claim and supports the plaintiff in his conduct.

No person against whom an order has been made under this section shall, by reason thereof, be exempted from any criminal liability in respect of any claim or defence made by him. The amount of any compensation awarded under S. 35-A in respect of a false or vexatious claim or defence shall, however, be taken into account in any subsequent suit for damage or compensation in respect of such claim or defence.

Before awarding compensatory costs the court has to satisfy itself that the claim or defence was false or vexatious to the knowledge of the party by whom it has been put forward, i. e., the plaintiff, that the interest of justice requires compensatory costs to be awarded and that the objector had put forward his objection that the suit was false or vexatious at the earliest oppor-

tunity. [*Veradrajulu v. Laxminarayana*, (1949) 2 M. L. J. 744]. The Code of Civil Procedure (Amendment) Act, 1956 (66 of 1956), has, however, enlarged the powers of the court to grant compensatory costs even in cases where the objection had not been taken at the earliest opportunity, if the court thinks fit to grant the same. This has been done to check frivolous litigation. The section has been made applicable to execution proceedings as well. The section is wide enough to bring within it not only a party who actually puts forward a false claim or defence but also a person who instigates and supports the latter. (*Chittam Subhayya v. Muthyala Ramchandrapa*, I. L. R. 1945 Mad. 407).

A suit involving arguable and complicated questions of fact and law cannot be held to be "frivolous and vexatious" to warrant the awarding of compensatory costs. [*Kotturuswami v. Virava* (1949) 2 M. L. J. 582].

35-B. Costs for causing delay. -- (1) If, on any date fixed for the hearing of a suit for taking any step therein, a party to the suit—

- (a) fails to take the step which he was required by or under this Code to take on that date, or
- (b) obtains an adjournment for taking such step or for producing evidence or on any other ground,

the Court may, for reasons to be recorded, make an order requiring such party to pay to the other party such costs as would, in the opinion of the Court, be reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the Court on that date, and payment of such costs, on the date next following the date of such order, shall be a condition precedent to the further prosecution of —

- (a) the suit by the plaintiff, where the plaintiff was ordered to pay such costs,
- (b) the defence by the defendant where the defendant was ordered to pay such costs.

Explanation.—Where separate defences have been raised by the defendants or groups of defendants, payment of such costs shall be a condition precedent to the further prosecution of the defence by such defendants or groups of defendants, as have been ordered by the Court to pay such costs.

(2) The costs, ordered to be paid under sub-section (1) shall not, if paid, be included in the costs awarded in the decree passed in the suit ; but, if such costs are not paid, a separate order shall be drawn up indicating the amount of such costs and the names and addresses of the persons by whom such costs are payable and the order so drawn up shall be executable against such persons.

Section 35-B has been inserted by the Amendment Act, 1976, so as to avoid delay in the disposal of suits. Payment of compensatory costs for causing delay is a condition precedent to the further prosecution of the suit or the defence by the plaintiff or defendant concerned. The new provision gives discretion to the court to impose compensatory costs on parties responsible for causing delay in the disposal of the litigation, and such costs would be irrespective of the ultimate result of the litigation.

ORDER XXA

Costs

1. Provisions relating to certain items.—Without prejudice to the generality of the provisions of this Code relating to costs, the Court may award costs in respect of—

- (a) expenditure incurred for the giving of any notice required to be given by law before the institution of the suit ;
- (b) expenditure incurred on any notice which, though not required to be given by law, has been given by any party to the suit to any other party before the institution of the suit ;
- (c) expenditure incurred on the typing, writing or printing of pleadings filed by any party ;
- (d) charges paid by a party for inspection of the records of the Court for the purposes of the suit ;
- (e) expenditure incurred by a party for producing witnesses even though not summoned through Court ; and
- (f) in the case of appeals, charges incurred by a party for obtaining any copies of judgments and decrees which are required to be filed along with the memorandum of appeal.

2. Costs to be awarded in accordance with the rules made by High Court.—The award of costs under this rule shall be in accordance with such rules as the High Court may make in that behalf.

Order XXA has been inserted by the Code of Civil Procedure (Amendment) Act, 1976, to empower the Court to award costs in respect of expenditure incurred for giving any notice required to be given by law or otherwise prior to the institution of the suit and typing charges, inspection expenses, etc.

PART II

EXECUTION

[Sections 36-74, 135 and 135-A and Order 21]

36. Application to orders.—The provisions of the Code relating to the execution of decrees (including provisions relating to payment under a decree) shall, so far as they are applicable, be deemed to apply to the execution of orders (including payment under an order).

Section 36 lays down that the provisions of the Code relating to the execution of decrees including provisions relating to payment under a decree, are also applicable to the execution of orders, including payment under an order.

Execution is the enforcement by the process of the court of its own decrees.

The decree to be executed is the decree of the court of last instance where an appeal has been preferred. The decree of the original court is merged in the decree of the superior court which alone is executable. Where there is no appeal, the decree to be executed is the decree of the court of first instance.

Execution of Orders.—Order is the formal expression of any decision of a civil court which is not a decree.

Contempt proceedings.—An order of the High Court in contempt proceedings is an order within the meaning of S. 2 (14), C. P. C., and can be executed under S. 36. [*Onkermull Jalan v. Padarnpat Singhania*, I. L. R. (1949) 1 Cal. 355.]

Modes of paying money under decree—(1) All money, payable under a decree shall be paid as follows, namely :—

- (a) by deposit into the court whose duty it is to execute the decree, or sent to that court by postal money order or through a bank ; or
- (b) out of court, to the decree-holder by postal money order or through a bank or by any other mode wherein payment is evidenced in writing ; or
- (c) otherwise, as the court which made the decree, directs.

(2) Where any payment is made under cl. (a) or cl. (c) of sub-rule (1), the judgment-debtor shall give notice thereof to the decree-holder either through the court or directly to him by registered post acknowledgment due.

(3) Where money is paid by postal money order or through a bank under cl. (a) or cl. (b) of sub-r. (1), the money order or payment through bank, as the case may be, shall accurately state the following particulars, namely :—

- (a) the number of the original suit ;
- (b) the names of the parties or where there are more than two plaintiffs or more than two defendants, as the case may be, the names of the first two plaintiffs and the first two defendants ;
- (c) how the money remitted is to be adjusted, that is to say, whether it is towards the principal, interest or costs ;
- (d) the number of the execution case of the court, where such case is pending ; and
- (e) the name and address of the payer.

(4) On any amount paid under cl. (a) or cl. (c) of sub-r. (1), interest, if any, shall cease to run from the date of service of the notice referred to in sub-r. (2).

(5) On any amount paid under Cl. (b) of sub-r. (1) interest, if any, shall cease to run from the date of such payment :

Provided that where the decree-holder refuses to accept the postal money order or payment through a bank, interest shall cease to run from the date on which the money was tendered to him, or where he avoids acceptance of the postal money order or payment through bank, interest shall cease to run from the date on which the money would have been tendered to him in the ordinary course of business of the postal authorities or the bank, as the case may be. (O. 21, r.1).

A court executing a decree shall execute it as it stands. It cannot modify or vary the terms of the decree. But the execution court has the right to construe a decree in the light of the applicable provisions of law and if on a construction of the decree in the light of the applicable provisions of law, it found that the deposit made on a certain date was according to law, a deposit in compliance with the terms of the decree, then the execution court was not varying the terms of the decree, but executing the decree as it stood after considering the effect of the deposit in the light of the relevant law. [*C. F. Angaid v. Y. S. Hirannayya*, (1972) I. S. C. J. 505].

Payment out of Court to the decree-holder. - Order 21, rule 2, of the Code of Civil Procedure deals with payment out of court to a decree-holder. That rule provides that where any money payable under a decree of any kind is paid out of court or a decree of any kind is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the court whose duty it is to execute the decree, and the court shall record the same accordingly. [O. 21, r. 2 (1)]. There is no reason to distinguish between a money decree and any other kind of decree for the purpose of recording an adjustment under O. 21, r. 2, C. P. C. (*Sri Ram v. Lekhraj*, 1952 A. L. J. 239).

The judgment-debtor or any person who has become surety for the judgment-debtor also may, within 30 days of the payment made by him, inform the court of such payment or adjustment (vide Article 125 of the Limitation Act, 1963), and apply to the court to issue a notice to the decree-holder to show cause why such payment or adjustment should not be recorded as certified and if the decree-holder fails to show cause the court shall record the same accordingly. [O. 21, r. 2 (2)]. If the decree-holder contests the claim of the judgment-debtor, it is the duty of the court to give a judicial decision. Where the objection is filed more than 30 days after the date of adjustment, it cannot be treated as an application for recording the adjustment. (*Ramnath Sarma v. Baidyanath Chatterjee*, A. I. R. 1954 Cal. 620).

Formal separate application not necessary when judgment-debtor's objection to execution is filed within 30 days.—O. 21, r. 2 (2) C. P. C. does not specify any particular form by which the judgment-debtor may inform the Court of the payment, and all that it requires is that the Court should be informed that the judgment-debtor claims that the decree has been satisfied by payment and adjustment and that he should also apply to the Court to issue a notice to the decree-holder to show cause why such payment or adjustment should not be recorded as certified. An objection or a counter-statement if filed by the judgment-debtor within 30 days can be regarded as a sufficient compliance of the procedural requirement. No separate application is necessary. The trend of decisions of the Madras High Court clearly shows that the Court has discretion to accept the objection statement of the judgment-debtor as an appli-

cation for recording satisfaction. The preponderance of the view of the various High Courts, in spite of divergence in some of them, is that the judgment-debtor's objection statement could well be regarded as a sufficient compliance, provided it is filed within 30 days.¹ (*Sellamuthu Vannam v. Chinnanna Moopan*, 78 M. L. W. 447).

Clause (2A) of r. 2 provides that no payment or adjustment shall be recorded at the instance of the judgment-debtor unless—

- (a) the payment is made in the manner provided in r. 1 ; or
- (b) the payment or adjustment is proved by documentary evidence ; or
- (c) the payment or adjustment is admitted by, or on behalf of, the decree-holder in his reply to the notice given under sub-r. (2) of r. 1, or before the court.

Rule (2A) further provides that a payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised by any court executing the decree. It is, therefore, to be noted that it is only the executing court that is debarred from recognising such uncertified payment. The bar does not apply to any other court, where a suit for payment may lie.

The policy of the legislature is to prevent a controversy during execution proceedings as to whether the dispute between the parties has been settled.

A certification by the decree-holder under rule 2 of Order 21 has no period of limitation and can be made at any time and without notice to the judgment-debtor. But an application by the judgment-debtor has to be made to the court within 30 days of the payment or adjustment.

As said earlier, the executing court shall not recognise any payment made outside the court which has not been certified or recorded. But an executing court may make an inquiry with a view to proceeding under S. 340 of the Code of Criminal Procedure, 1973 (Act No. 2 of 1974). A criminal court is also not precluded from enquiring the payment.

The judgment-debtor has the following remedies in case of non-recognition of payment :

1. He may move the court under rule 2 (2) of Order 21 if limitation has not expired to record the alleged payment or adjustment.
2. He may bring a suit for recovery of damages for breach of the contract represented by the payment or adjustment.
3. He may bring a fresh suit to claim back the money that the creditor has not certified to the executing court.
4. He may file a criminal complaint under S. 210 of the Indian Penal Code for fraudulently executing a decree even after satisfaction or may prosecute the decree-holder for giving false statement under Ss. 191 and 193, I. P. C.

The judgment-debtor, however, in such circumstances, cannot sue for a declaration that the decree is satisfied or adjusted ; nor can he sue to restrain the decree-holder from executing the decree. (*Azizan v. Matuk Lal*, 21 C. 407, F. B.).

1. Article 125 of the Limitation Act, 1963, prescribes the period of limitation as 30 days for recording an adjustment or satisfaction of a decree from the date when payment or adjustment is made. The period of 90 days earlier provided for this purpose has been modified to that extent.

Commencement of Execution Proceedings.—All proceedings in execution are commenced by an application for execution.

Where a decree is for the payment of money the court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor prior to the preparation of a warrant if he is within the precincts of the court. [O. 21, r. 11 (1)].

Save as above, every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person acquainted with the facts of the case, and shall contain in a tabular form the following particulars :

(a) the number of the suit ; (b) the names of the parties ; (c) the date of the decree ; (d) whether any appeal has been preferred from the decree ; (e) what payment, if any, or other adjustment of the matter in controversy has been made between the parties subsequently to the decree ; (f) if previous applications have been made for execution of the decree, the dates of such applications and their results ; (g) the amount with interest due upon the decree ; (h) the amount of the costs, if any, awarded ; (i) the name of the person against whom execution of the decree is sought ; and (j) the mode in which the assistance of the court is required, whether—

- (1) by the delivery of any property specifically decreed ;
- (2) by the attachment, or by the attachment and sale, or by the sale without attachment, of any property ;
- (3) by the arrest and detention in prison of any person ;
- (4) by the appointment of a receiver ;
- (5) otherwise, as the nature of the relief granted may require. [O. 21, r. 11 (2)].

Where an application is made for the arrest and detention in prison of the judgment-debtor, it shall state, or be accompanied by an affidavit stating, the grounds on which arrest is applied for.

When an application for restitution does not prescribe any specific form, a prayer *simpliciter* for the recovery of the property lost to the applicant is an adequate compliance. It is only when regular execution proceedings are taken out under Order XXI that Rule 11 comes into play.

No doubt, sub-clause (j) is somewhat omnipotent and the decree-holder can seek assistance of the Court by simply saying that assistance should be granted as the nature of the relief would require, but he has to specify something in making such a request. Orders made in restitution proceedings are decrees within the meaning of S. 2 (2) and even on the bare passing of such a decree the judgment-debtor may choose to obey the same and an application to take further execution proceedings may not arise. If he does not prefer to adopt such a measure, it would be still open to the party to execute the order as a decree by resorting to the provisions of Order XXI, C. P. C. The doors of execution would be open to him till they are closed by the law of limitation. (*Dr. Martand Ramchandra Potdar v. Dr. Dattatraya Ramchandra Potdar*, A. I. R. 1975 Bombay, 237).

Where an application is made for the attachment of any movable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same. [O. 21, r. 12].

Where an application is made for the attachment of any immovable property belonging to a judgment-debtor, it shall contain at the foot—

- (a) a description of such property sufficient to identify the same ;
- (b) a specification of the judgment-debtor's share or interest in such property. (O. 21, r. 13).

Notice of the application for execution.—The law does not require any notice to be issued to the party against whom execution is applied for except in the following cases :

1. Where an application for execution is made more than two years after the date of the decree or more than one year after the date of the last order made on any previous application for execution ;
2. Where an application for execution is made against the legal representative of the judgment-debtor ;
3. Where an application for execution is made of a decree passed by courts of the United Kingdom or any reciprocating territory ; (O. 21, r. 22).
4. Where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor, unless where the court is satisfied, by affidavit or otherwise, that, with the object of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the court ; and
5. Where the interest of the decree-holder has been transferred by assignment.

Sale not to be set aside on the death of the judgment-debtor before the sale but after the service of the proclamation of sale.—Where any property is sold in execution of a decree, the sale shall not be set aside merely by reason of the death of the judgment-debtor between the date of the issue of the proclamation of sale and the date of the sale notwithstanding the failure of the decree-holder to substitute the legal representative of such deceased judgment-debtor, but, in case of such failure, the court may set aside the sale if it is satisfied that the legal representative of the deceased judgment-debtor has been prejudiced by the sale. (O. 21, r. 22-A).

Who may apply for execution.—It is the decree-holder who has to apply for execution of the decree.

Joint decrees.—Where the decree has been passed jointly in favour of more persons than one, any one or more of such persons may apply for the execution of the whole decree for the benefit of them all, unless the decree imposes any condition to the contrary. (O. 21, r. 15).

Where the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the court which passed it. In case of transfer by assignment notice of the application for execution shall be given to the transferor and the judgment-debtor and the decree shall not be executed until the court has heard their objections, if any, to its execution. (O. 21, r. 16).

If the decree-holder dies and his legal representatives make an application praying that they may be substituted as representatives under O. 21, r. 16, the application is sufficient compliance with the provisions of O. 21, r. 16, inasmuch as the prayer in the application amounts to a prayer not only to be brought on record but also to be allowed to proceed with the execution pro-

ceedings and that no fresh application for execution is, therefore, necessary. (*Sheikh Riyazul Haq, Mazharul Haq, Momina Khatoon v. Abdur Rahman and Sheikh Bechai*, 1973 A. L. J. 950).

37. Definition of Court which passed a decree.—The expression “Court which passed a decree”; or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include—

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

Explanation.—The Court of first instance does not cease to have jurisdiction to execute a decree merely on the ground that after the institution of the suit wherein the decree was passed or after the passing of the decree, any area has been transferred from the jurisdiction of that Court to the jurisdiction of any other Court ; but in every such case, such other Court shall also have jurisdiction to execute the decree, if at the time of making the application for execution of the decree it would have jurisdiction to try the said suit.

COURTS BY WHICH DECREES MAY BE EXECUTED

38. Court by which decree may be executed.—A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.

The court which passed a decree may of its own motion send it for execution to any subordinate court of competent jurisdiction. [S. 39 (2)].

The expression “court which passed a decree” is deemed to include—(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the court of first instance, and (b) where the court of first instance has ceased to exist, the court which would have jurisdiction to try such suit.

Section 38 and O. 21, r. 6, C. P. C., require that the court which passed the decree should send it to the court which is required to execute it. No particular manner of sending it is prescribed. There is nothing in the section or the rule to prevent the court passing the decree handing over the execution application to the decree-holder himself with a direction to take it to the court required to execute it. When this is done, the requirements of the Code are complied with. The real purpose of the provisions is that the executing court should have authority of the court which passed the decree to enable it to

execute it. The vital part of the provision is the existence of this authority and not the manner of its transmission to the other court. [*Parmanand Rai v. Balram Das Fakir Chand*, 1960 A. L. J. 423].

Principles governing construction of decree.—Where there is no ambiguity in the terms of a decree, the court is bound to interpret it according to its plain meaning and cannot ignore its terms. Where, however, there is any ambiguity in the decree, the court may and should construe the decree in order to ascertain its precise meaning. When the decree was in general terms that the suit stood decreed, it only meant that all the reliefs asked for in the plaint had been decreed. [*Satrughna Sabata v. Shridhar Sabata*, I. L. R. (1966) Cut. 368].

39. Transfer of decree. (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court of competent jurisdiction, —

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

(3) For the purposes of this section, a Court shall be deemed to be a Court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such Court would have jurisdiction to try the suit in which such decree was passed.

The provisions of S. 39 are permissive and not mandatory. An application for transfer is not required to be in any particular form.

An order rejecting an application for transfer being a question relating to execution under S. 47 is appealable.

Under the provisions of S. 39 (2) it is permissible for the Court which passed a decree to send it for execution of its own motion to any subordinate Court of competent jurisdiction. The expression 'competent jurisdiction' does not authorise the aforesaid court to transfer the decree to any court for execution irrespective of pecuniary jurisdiction. It refers to territorial and pecuniary jurisdiction to deal with the decree and not competency to try the original suit, the test being the value of the decretal amount and not the original value of the suit.

40. Transfer of decree to Court in another State.—Where a decree is sent for execution in another State, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that State.

The law of limitation applicable for execution of a decree transferred to another province, i. e., another State, is the law in force in the transferring court, but for procedural rules governing execution the law of State of the transferee Court applies.

41. Result of execution proceedings to be certified.—The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure.

There is no particular form of certificate prescribed in S. 41. An intimation that the execution case is dismissed is sufficient compliance within the provisions of the Act. (*Darson Singh v. Baldeo Das*, 25 Pat. 145).

42. Powers of Court in executing transferred decree.—(1) The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

(2) Without prejudice to the generality of the provisions of sub-section (1), the powers of the Court under that sub-section shall include the following powers of the Court which passed the decree, namely :

(a) power to send the decree for execution to another Court under S. 39 ;

(b) power to execute the decree against the legal representative of the deceased judgment-debtor under S. 50 ;

(c) power to order attachment of a decree,

(3) A Court passing an order in exercise of the powers specified in sub-section (2) shall send a copy thereof, to the Court which passed the decree.

(4) Nothing in this section shall be deemed to confer on the Court to which a decree is sent for execution any of the following powers, namely :

(a) power to order execution at the instance of the transferee of the decree ;

(b) in the case of a decree passed against a firm, power to grant leave to execute such decree against any person, other than such a person as is referred to in cl. (b), or cl. (c), of sub-rule (1) of r. 50 of O. XXI.

Sub-sections (2) to (4) have been added to S. 42 with a view to avoiding delay in execution proceedings by conferring additional powers on the court to which a decree has been transmitted for execution, the additional powers conferred on the transferee court being (a) to send the decree for execution to another court ; (b) to execute the decree against the legal representatives of the judgment-debtor ; and (c) to order attachment of a decree. Sub-section (4) however provides that the transferee court shall not have powers in regard to determination of matters which lie within the domain of the court which passed the decree and which are detailed in that sub-section.

A court to which a decree is transferred for execution has in executing such decree to execute it in accordance with the law of procedure obtaining in that court, but it has to determine the rights and liabilities of the parties in accordance with the substantive law obtaining in the court which passed the decree. Where a decree passed by the High Court of Calcutta in its original side in respect of a commercial loan is transferred for execution to a court in Bihar, the provisions of the Bihar Money Lenders Act cannot be applied in executing that decree. (*Inder Chand v. Bansropan*, 26 Pat. 307).

Mode of Transfer.—Where a decree is to be sent for execution to another court, the court which passed such decree shall send the decree directly to such other court whether or not such other court is situated in the same state, but the court to which the decree is sent for execution shall, if it has no jurisdiction to execute the decree, send it to the court having such jurisdiction. [O. 21, r. 5].

Stay of Execution.—Execution is the culmination of the suit. It is its final stage and the means are employed in due process of law to make a decree or order of a court effective. “Stay of execution,” therefore, means the suspension of the act of completing or carrying into effect the decree or order of a court. Execution proceedings are commenced when the successful party makes an application in writing to the executing court. When execution is stayed the proceedings, started by the successful party, on an application to the executing court, are suspended pending further orders of the court,

Stay by Appellate Court.—An appeal does not operate as a stay of proceedings under a decree or order appealed from, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree. The appellate court may, however, for sufficient cause, order stay of execution of such decree, which shall be effective from the date of the communication of the order to the court of first instance, but that court may act on an affidavit sworn by the appellant, based on his personal knowledge, pending the receipt of the stay order from the appellate court. [O. 41, r. 5(1)].

Stay by the court which passed the decree.—Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the court which passed the decree may, on sufficient cause being shown, order the execution to be stayed. [O. 41, r. 5 (2)].

No order for stay of execution shall be made by the appellate court or the court passing the decree as aforesaid, unless the court making it is satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made ;

(b) that the application has been made without unreasonable delay ;
and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him. [O. 41, r. 5 (3)].

Subject to the provisions of sub-rule 3, the court may make an *ex parte* order for stay of execution pending the hearing of the application. [Order 41, rule 5 (4)].

Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-r. (3) of r. 1, the court shall not make an order staying the execution of the decree. [O 41, r. 5 (3)].

Under Order 21, rule 26, C. P. C., the court to which a decree has been sent for execution may, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to an appellate court for an order to stay execution. Before making an order to stay execution the court may require such security from the judgment-debtor as it thinks fit.

Under rule 29 of the same Order the court may, on security or otherwise, stay execution of a decree, until the decision of a suit pending in it, filed by the judgment-debtor against the decree-holder.

In Supreme Court appeals the High Court may stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any order which the Supreme Court may make on the appeal.

The High Court has also the power to stay execution in view of an application to the Supreme Court for special leave.

In summary suits if the defendant does not enter an appearance and has not applied for leave to defend or if such application has been made and is

refused the plaintiff shall be entitled to the judgment forthwith. But the court may, after decree under special circumstances, stay execution and give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit. (O. 37).

43. Execution of decrees passed by Civil Courts in places to which this Code does not extend.—Any decree passed by any Civil Court established in any part of India to which the provisions of this Code do not extend, or by any Court established or continued by the authority of the Central Government outside India, may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in the manner herein provided within the jurisdiction of any Court in the territories to which this Code extends.

44. Execution of decrees passed by Revenue Courts in places to which this Code does not extend.—The State Government may, by notification in the Official Gazette, declare that the decrees of any revenue Court in any part of India to which the provisions of this Code do not extend, or any class of such decrees, may be executed in the State as if they had been passed by Courts in that State.

44-A. Execution of decrees passed by Courts in reciprocating territory.—(1) Where a certified copy of a decree of any of the superior courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall, as from the filing of the certified copy of the decree, apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.

Explanation 1.—‘Reciprocating territory’ means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section ; and ‘superior

Courts' with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation 2.—"Decree," with reference to a superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.

Fiction enacted nothing to do with limitation.—When a statutory provision creates a fiction, it is first necessary to find out the purpose for which it was created, in order to understand the scope and implication of the fiction. The whole purpose of the fiction created by the words, 'as if it had been passed by the District Court' in S. 44-A (1) of the Code, clearly in the context of the preceding sections appears to determine or fix the particular District Court in India to execute the foreign decree or judgment and attract to its execution by such Court the manner of procedure that governs execution of its own decrees. The purpose and ambit of the fiction go no further. The law of limitation as contained in the Limitation Act is a procedural law and as *lex fori*, will however, apply, independently of S. 44-A (1) to execution in India of a foreign judgment of a superior court in a reciprocating territory. But the effect of its application is a different thing which is a matter of construction.

The jurisdiction of the District Court in this country to execute a foreign judgment arises from and is exercisable by the filing of a certified copy of the foreign decree or judgment. It is only thereafter, and never until then the procedural laws as to *lex fori* will be attracted to execution. The Limitation Act can apply possibly to such execution only after filing a certified copy of the foreign decree or judgment as required by S. 44-A (1). Section 44-A (1) of the Code does not require the filing of a non-satisfaction certificate as a condition for the District Court to assume jurisdiction. The requirement relates merely to procedure. There is no limitation for filing a certified copy of a foreign decree or judgment under S. 44 (1) of the Code. [*Sheik Ali v. Sheik Mohamed*, A. I. R. 1967 Mad. 45 (F. B.)].

Notice to the judgment-debtor is essential before execution of a foreign decree. If the foreign decree has been obtained by fraud, an Indian court is not bound to execute it. Not only this, an application for execution under section 44-A may be resisted on any of the grounds mentioned in section 13 which has been discussed in detail.¹

45. Execution of decrees outside India.—So much of the foregoing sections of this Part as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in any State to send a decree for execution to any Court established by the authority of the Central Government outside India to which the State Government has by notification in the Official Gazette declared this section to apply.

1. Pages 54-59, Part I, ante.

46. Precepts.—(1) Upon the application of the decree-holder the Court which passed the decree may, whenever it thinks fit, issue a precept to any Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree :

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property.

A precept is an order or direction given by one court to another, requiring some act to be done. The rule governing the issue of precepts is laid down in section 46. It provides that the decree-holder may apply to the court which passed the decree to issue a precept to that court within whose jurisdiction the property of the judgment-debtor is lying to attach the property belonging to the judgment-debtor and specified in the precept. The court to which the precept is sent shall then proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree. The attachment under the precept shall not continue for more than two months and it will be the duty of the judgment-debtor to get the period of attachment extended by an order of the court which passed the decree or to have the decree transferred, before the determination of such attachment, to the court by which attachment has been made.

Questions to be determined by Court executing Decree

47. Questions to be determined by the Court executing decree.—(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation I.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit

Explanation II.—(a) For the purposes of this section, purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed ; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section."

Section 145 of the Code (which deals with enforcement of liability of surety) makes the surety a party to the suit for purposes of section 47.

Section 47 has been enacted for the beneficial purpose of checking needless litigation and provides a cheap, speedy and expeditious remedy by empowering the court executing a decree to determine all questions arising between the parties to the suit relating to the execution, discharge or satisfaction of the decree. Two things are to be noted. The questions in respect of which a separate suit is barred must be questions relating to the execution, discharge or satisfaction of the decree and the parties between whom the questions arise must be parties to the suit in which the decree was passed, or their representatives.

Thus when a decree-holder takes in execution a property not included in the decree, the judgment-debtor has to proceed by an application under S. 47 of the Code for recovery of such property and a separate suit for that purpose will not lie.

If, however, a judgment-debtor or his legal representative objects to the execution of a decree on the ground that the decree is not valid, the question as to the validity of the decree is not one relating to the execution, discharge or satisfaction of the decree and cannot, therefore, be tried in execution proceedings under S. 47. Such a question can only be tried in a regular suit brought for the purpose.

Section 47 will apply only where a dispute arises between the parties to the suit ; it does not apply where the contest is between the parties to the suit and also a stranger. It is limited to cases where the satisfaction of the decree, as distinguished from the validity of the decree, is in question. As stated above, the two conditions for applicability of the section are : (1) that the question should relate to the execution, discharge or satisfaction of the decree and (2) that the question shall arise between the parties to the suit in which the decree was passed or their representatives. (*Abedonissa Khatoon v. Ameer-oonissa Khatoon*, 4 I. A. 66). The section is mandatory and bars both a suit and a defence.

The revised definition of the term 'decree' does not include the determination of any question within S. 47, C. P. C.

Execution, discharge or satisfaction of decree.—If the decree grants certain rights to both the parties there can be no doubt that those rights have to be

enforced in the execution proceedings and not by a separate suit as the matters relating to the execution of such rights are matters relating to the execution of the decree. Merely because the decree-holder's right given in the decree is satisfied it cannot be said that the judgment-debtor would not be able to apply in the execution proceedings for the enforcement of the rights given to him under that decree.

A decree for possession of the disputed land was passed but the judgment-debtor was allowed to remove within one month from the date of the decree the materials of the construction which had been built by him on the disputed land. It was held that the right of the judgment-debtor to remove the materials from the disputed land was a matter relating to the execution, discharge or satisfaction of the decree.

Where the decree-holder has obtained possession in execution of the decree in excess of that to which he was entitled under the decree, the remedy of the judgment-debtor, who is the owner of this excess property, is to apply in execution proceedings and not to file a separate suit for recovery of possession of that property.

The relief for damages is consequential to the relief for the removal of the materials and flows from it. The plaintiff could have been granted damages in execution proceedings if it was found that he had suffered on account of any wrongful act on the part of the decree-holder or his representatives-in-interest. (*Murari Lal v. Debi Narain*, 1956 A. L. J. 732).

Where the decree itself directs the sale of the property it is not open to any judgment-debtor to raise an objection that the property is not liable to sale and thus ask for a decision which would have really the effect of nullifying the decree itself. Such an objection does not relate to the execution, satisfaction and discharge of the decree and should not be entertained and decided by the executing court under S. 47, C. P. C. The position would be different if the property which was sought to be sold was not covered by the decree itself and was sought to be proceeded against by the court in exercise of its powers as an execution court on the move of the decree-holder. (*Mirza Daud Beg v. Mt. Mahmudi Begum*, 1952 A. L. J. 236).

Powers of the executing court.—The executing court cannot question the validity of a decree or entertain an objection as to the legality or otherwise of the decree. It has to take the decree as it stands and execute it according to its terms. The executing court must abide by the directions contained in the decree. It is beyond its province to question its legality or correctness. It has to “punctually obey, observe and carry out the decree into execution,” except for patent want of jurisdiction of the court, which is very different from erroneous exercise of jurisdiction. Otherwise it will infringe the conclusiveness of adjudications recognised in S. 2 (2) of the Code and an inferior court will be enabled to sit in judgment over the decision of a superior tribunal. (*Bajirao Narhar Peshwa v. Sakharani Balvant Peshwa*, 33 Bom. L. R. 463). The executing court cannot, therefore, enter into criticism of the decree or give relief against its rigours. It cannot allow objections that the decree was obtained by fraud or passed against a wrong person or against a minor, who was not properly represented. Such pleas can be raised not in the executing court but by means of a separate suit or by means of an appeal, if the same is permissible.

The powers of the executing court were fully discussed in *Kalipada Sarkar v. Hari Mohan Dalal*, (I. L. R. 44 Calcutta, 627). The question for determination in that case was, whether the validity of the decree could be questioned in execution proceedings on the ground that as the lunatic plaintiff was not properly represented by a competent next friend in the suit, no operative decree for costs could have been made against him. The Court observed that it was not in dispute that the court executing a decree must take the decree as it stands, and has no power to go behind the decree or to entertain an objection to the legality or correctness of the decree. The principle was recognised by the Judicial Committee in numerous cases. The doctrine itself was not disputed before their Lordships, but its applicability to the circumstances of the case was denied by the appellant. The argument in substance was that the lunatic was not at all represented before the court at the trial of the suit, and the court was consequently not competent to pass a decree to his detriment. Their Lordships repelled the contention by observing that the substance of the matter is that a proceeding to enforce a judgment is collateral to the judgment and therefore no enquiry into its regularity or validity can be permitted in such a proceeding. On this principle, it could properly be held that a judgment against a person who was *non compos mentis* at the time of the trial, and yet was not represented by a legal guardian, is not to be impeached in execution, but should be reversed or annulled in some direct proceeding taken for that purpose. Their Lordships accordingly were of opinion that the safest course to follow was to adhere rigidly to the established principle that every order and judgment however erroneous, was, in the words of Lord Cottenham in *Chick v. Cremer*, [1846] 2 Phil. 113, 115], good until discharged or declared inoperative, and that the execution court could not enquire into the validity or propriety of the decree. That, no doubt, assumed that there was a valid decree in existence, that is, an adjudication by a Court of Justice, a decree or order which had not ceased to be operative and was capable of execution.

When a decree directs possession to be delivered over a property, it intends that possession should be delivered over it in the same condition in which it was on the date of the decree. It follows that if the condition of the property is altered to the prejudice of the decree-holder by the time possession is delivered to him in execution, the decree is not fully satisfied, and whether the condition is altered or not to the prejudice of the decree-holder and to what extent, if at all, he should be compensated, are questions relating to the satisfaction of the decree within the meaning of S. 47 of the Code and the decree-holder should not be required to file another suit for damages. (*Mt. Phool Kuer v. Manohar Mal*, 1954 A. L. J. 730).

As said earlier, an execution court cannot go behind the decree and question its correctness ; but when the decree is silent and gives no indication as to what property should be sold in execution, it is permissible for the court to look into the judgment in order to find out whether upon any issue properly raised and determined as between the parties interested the property brought to sale has been held to belong to the judgment debtor. (*The Bank of Bihar Ltd. v. Sarangdhar Singh*, A. I. R. 1949 P. C. 8).

A Court executing a decree cannot go behind the decree between the parties or their representatives ; it must take the decree according to its tenor and cannot entertain any objection that it is incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a

decree even if it be erroneous is still binding between the parties. (*Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rahman* [(1970) II S. C. J. 558].

An executing court has no jurisdiction to entertain and decide the claim on an application for releasing the properties from attachment after sale has taken place because the sale *ipso facto* determines the attachment. A claimant's application for adjudication of his claim of title and possession over the disputed property before an allegation of resistance or obstruction on his part made by the decree-holder under O. 21, r. 97 of the Code was premature and has got to be dismissed without any enquiry. The claimant cannot pray for inherent jurisdiction either for passing an order releasing property from attachment. (*Manulal Singhania v. Natwar Lal Thakur*, A. I. R. 1976 Pat. 321).

A receiver in insolvency proceedings is not in the same position as a receiver in ordinary civil suit. The position of a receiver in insolvency is merely of an assignee in bankruptcy. It is not necessary for a party to obtain the leave of the court to proceed against a receiver appointed under the Provincial Insolvency Act.

An order passed by the executing court setting aside sale on the ground that the sale was illegal in the absence of the leave of the insolvency court appointing a receiver and releasing the property from attachment is erroneous and must be set aside. (*Manulal Singhania v. Natwar Lal Thakur*, A. I. R. 1976 Patna 321).

Exceptions.--There are, however, three cases where the executing court can go behind the decree. They are as under :

1. Where the decree is a nullity. The objection of the judgment-debtor that the decree is a nullity because it was passed against a dead person, without bringing his legal representatives on the record, is an objection which can be entertained by the executing court, for in such a case if the objection is proved there is no executable decree at all.

2. Where the decree is ambiguous. A decree instead of meaning one thing may mean two or more different things. In such a case it is the duty of the executing court to go behind the decree and seek to ascertain from the judgment and pleadings the true implication of the decree. This is necessary to enable the executing court to execute the decree.

3. Where the decree has been made by a court without jurisdiction, i. e., in respect of territorial or pecuniary jurisdiction or in respect of the judgment-debtor's person. An objection based on the ground of jurisdiction can be entertained by the executing court for, if the decree has been passed without jurisdiction by a court, there is no executable decree.

Neither acquiescence nor consent of parties can confer jurisdiction on a court which lacks inherent jurisdiction and a decree passed without jurisdiction is a nullity. (*Khairullah v. Badri*, A. I. R. 1973 Alld. 340).

In *Kiran Singh v. Chaman Paswanu*, A. I. R. 1954 S. C. 340, the Supreme Court observed as follows :

"It is a fundamental principle that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction whether it

is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties."

To maintain a valid objection under S. 47, C. P. C., it must be shown that there is or was a decree capable of execution. If a decree is not capable of execution, no question of its execution can arise. Therefore, S. 47 of the Code of Civil Procedure cannot bar a suit for the enforcement of certain claims which have accrued subsequent to the passing of the decree even though by virtue of rights declared by the decree. (*L. K. Singhania v. L. Ram Gopal Gupta & others*, 1972 A. L. J., p. 974).

Parties to the proceeding.—A question between the parties as to who are the legal representatives of a deceased judgment-debtor falls within the purview of S. 47, C. P. C. (*Rehi Damodar v. Sone Basant*, I. L. R. 27 Pat. 848).

Where in execution of a decree passed against a legal representative to be recovered from the estate of the deceased certain personal property of the legal representative is attached, the objection of the legal representative being a party to the suit shall be determined by the court executing the decree under S. 47, C. P. C., and not by a separate suit.

It is the duty of the executing court to decide who is the legal representative of the deceased judgment-debtor, and it has jurisdiction to decide the question. The fact that the decision was wrong will not vitiate the execution proceedings and the sale as being without jurisdiction.

The word "representative" in S. 47 includes not only a legal representative but also a representative-in-interest who is bound by the decree.

A *pro forma* defendant is also a party to the suit. An auction purchaser is as well a party in proceedings in execution of the decree based on the mortgage.

Act 66 of 1956 has substituted a new explanation for the old one so as to enlarge the scope of the term "parties to the suit" by adding a purchaser at a sale in execution of the decree along with a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed to be parties to the suit. This has set at rest the controversy arising out of conflicting decisions by expressly providing that a purchaser at a sale in execution of the decree shall be a party to the suit for purposes of section 47.

After an auction sale of an immovable property in execution of a decree, a decree-holder auction-purchaser can move the executing court for delivery of vacant possession. It is not necessary for him to file a separate suit for this purpose. Section 47 of the Code of Civil Procedure should be construed liberally. If a liberal construction be put upon it, it is difficult to understand why a decree-holder who has been a party to the decree will shed his character as such party merely upon purchasing the property at the execution sale. After all a decree-holder purchases the property in execution of his decree with the permission of the Court. There is no reason why he should not retain his character of a party to the suit until the delivery of possession to him of the property purchased by him. Having regard to this consideration, if any question is raised by the judgment-debtor at the time of delivery of possession concerning the nature of the rights purchased and if the judgment-debtor offers any resistance to delivery of possession the question must be one which relates to the execution, discharge and satisfaction between the parties to the suit. If

a confirmation of the sale would finally terminate all questions as to execution of the decree it is difficult to appreciate why the Legislature would frame such rules as rules 95 to 102 under O. 21 of the Code.

It is important to remember that after the decision of the Privy Council in *Ganapathy v. Krishnamachariar*, (45 I. A. 54), there has been an amendment of S. 47 as a result of which the purchaser at a sale in execution of a decree, whether he is the decree-holder or not, is unquestionably a party to the suit for the purpose of S. 47. Having regard to this, all questions arising between the auction-purchaser and the judgment-debtor must be determined by the executing court and not by a separate suit. (*Harnandai Badridas v. Debidutt Bhagwati Prasad* [(1974) II S. C. J., 196]).

Minor.—Where there is nothing-illegal on the face of the decree the executing court cannot enquire if the minor was properly served or represented in the suit. An objection by the judgment-debtor that he was sued as a major while he was a minor, in effect, amounts to a plea that he was not a party and consequently the remedy is a suit. The executing court cannot determine this objection under section 47, C. P. C.

Where a decree was passed on a compromise entered into by the mother as guardian *ad litem* after obtaining due leave under the provisions of the Code and the guardian *ad litem* did not turn up in execution proceedings with the result that the executing court ordered execution to proceed, it was held that the objections on behalf of the minor to the validity of the decree passed upon the negligence of his guardian should be taken before the trial court. (*Virendrakumar v. Nathulal*, M. B. L. J. 1955 H. C. R. 1066).

Claim by legal representative.—Where a decree for sale of mortgaged property is passed against a mortgagor and on his death his legal representative is brought on the record, an objection that the property belonged to the legal representative (and not to the mortgagor) cannot be enquired into by the execution court. To permit such an objection to be entertained by the execution court will be to permit that court to question the validity of the decree itself, and such a question does not pertain to execution, discharge or satisfaction of the decree as envisaged by section 47, C. P. C. (*Devassia Phitipose v. Harihar Iyer*, I. L. R. 1952 T. C. 275).

Remedy by separate suit in case of death of judgment-debtor pending execution of decree for eviction.—It is not open to the legal representative of a deceased judgment-debtor, brought on record during the execution of a decree for eviction, to raise the question, having regard to the provisions of section 47 that the decree sought to be executed was not binding on him having been obtained in a fraudulent and collusive manner, and a suit by the legal representative for declaration of his title and recovery of possession of the land in dispute on grounds mentioned above is not barred by section 47. (*Karamat Ali v. Mt. Sogra*, A. I. R. 1962 Patna, 434).

Objection to execution.—The legality of the execution proceedings or jurisdiction of the executing court to order sale is a matter falling under section 47, C. P. C. But an objection by the judgment-debtor that the decree is invalid as being collusive or that the decree was obtained by fraud can be tried only in a regular suit and not in execution. These questions relate to the validity of the decree and not to execution, discharge or satisfaction of the decree. The executing court cannot go behind the decree and enquire into its validity. The law is that which in reality forms the basis of an independent suit cannot be introduced as a question to be tried in execution proceedings.

Decree without jurisdiction.—An executing court cannot generally question the validity of the decree ; but where it was passed without jurisdiction or is otherwise a nullity, the executing court can question its validity and refuse to execute the decree on that ground. (*Uttamchand v. Wasudeo*, 1946 N. L. J. 317).

Delivery of possession.—Where the decree is for possession, it is for the executing court to go into the question if the dispute relates as to what lands constitute the subject-matter.

Adjustment.—Where in execution of a money decree a judgment-debtor pleads payment or adjustment the question falls within section 47, C. P. C., and can be dealt with in execution proceedings, but an uncertified payment or adjustment cannot be entertained under section 47 of the Code by the court executing the decree. An agreement not to execute a decree entered into subsequent to the filing of the suit but prior to the passing of the decree can be pleaded in bar of execution and the executing court can determine if the agreement was true. The executing court has no jurisdiction to inquire into a payment or adjustment before the decree at variance with the latter. (*Seth Sanwal Das v. Seth Narain Das*, A. I. R. 1955 Bhopal, 3).

Excessive Execution.—A question relating to excessive execution raised by a person who was a party to the suit should be dealt with by the court executing the decree and not by a fresh suit.

Sale in contravention of Stay Order.—An application to set aside the sale held in contravention of a stay order is, as between the parties to the suit, an application under section 47, C. P. C. In any event it is an application maintainable under section 151 of the Code and an order thereon is appealable. (*Ayyammal v. Thangavelu Padayachi*, A. I. R. 1955 Mad. 317).

Interlocutory orders.—Interlocutory orders dealing with mere matters of procedure can hardly be said to be determination of any question within section 47 and are not appealable. There must be determination of the rights or liabilities of the parties to the execution, discharge or satisfaction of the decree.

Competency of Appeal.—An appeal lies against an order of the lower court refusing to stay execution. (*Sundarsan v. Venkatesiah*, 1948 M. N. W. 777).

Fresh suit for possession barred.—Where the plaintiffs were granted a decree for possession by partition which they did not execute and allowed it to get time-barred and not even otherwise obtain possession over the property, they cannot maintain a fresh suit for possession on the basis of the earlier decree, and such a suit is barred by S. 47, C. P. C. (*Ram Nath v. Mst. Nanhi Begam*, 1964 A. L. J. 245).

Appealability of an order under S. 47.—An order in execution proceedings deciding any dispute between the parties affecting the substantive rights can form the subject-matter of an appeal under Ss. 47 and 96 of the Civil Procedure Code. [*Periakaruppan Chettiar v. Venugopal Pillai*, I. L. R. (1947) Mad. 132].

OBJECTION TO ATTACHMENT OF PROPERTY BY A THIRD PARTY AND INVESTIGATION OF CLAIMS

Rule 58 of Order 21 provides that where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of

a decree on the ground that such property is not liable to such attachment, the court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained :

Provided that no such claim or objection shall be entertained—

(a) where, before the claim is preferred or objection is made, the property attached has already been sold ; or

(b) where the court considers that the claim or objection was desiged or unnecessarily delayed. [O. 21, r. 58 (1)].

All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under r. 58 and relevant to the adjudication of the claim or objection, shall be determined by the court dealing with the claim or objection and not by a separate suit. [O. 21, r. 58 (2)].

Upon the determination of the questions referred to in sub-r. (2), the court shall, in accordance with such determination,—(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit ; or (b) disallow the claim or objection ; or (c) continue the attachment subject to any mortgage, charge or other interest in favour of any person ; or (d) pass such order as in the circumstances of the case it deems fit. [O. 21, r. 58 (3)]

Where any claim or objection has been adjudicated upon under r. 58, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree. [O. 21, r. 58 (4)].

Where a claim or an objection is preferred and the court, under the proviso to sub-r. (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute ; but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive. [O. 21, r. 58 (5).]

The object of the rule is to secure a speedy settlement of the question of title raised at an execution sale. It gives the claimant a speedy and summary remedy. The court is bound to decide the question of possession when an objection is made to the attachment of the property in execution of a decree. On the question of possession the onus is on the claimant or objector.

Effect of Order.—Decision in claim proceedings under rule 58 becomes conclusive and operates as *res judicata* in later proceedings. But the dismissal of an application under rule 58 does not prevent the person from applying to have the sale set aside under rule 89 in case of sale of an immovable property in execution of a decree on his depositing in court for payment to the purchaser a sum equal to five per cent. of the purchase money and for payment to the decree-holder the amount specified in the proclamation of sale.

The remedy provided by rule 58 of Order 21 to third parties is permissive and alternative.

As stated above, an order under rule 58 is conclusive and it cannot be challenged by a separate suit. It can only be challenged in a suit brought under rule 58 (5) within a year from the date of the final order, the rule laying down that where a claim or an objection is preferred, and the court under proviso to sub-r. (1), [viz. where before the claim is preferred or objection is made, the attached property had been sold or where the court holds that the claim or

objection was designedly or unnecessarily delayed], the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute but, subject to the result of such suit, if any, the order refusing to entertain the claim or objection shall be conclusive. He may also bring a regular suit without taking recourse to the provisions of O. 21, r. 58.

Claimant to prove his interest in the attached property on the date of attachment.—A claim or an objection under O. 21, r. 58 can be allowed only if, on evidence adduced by him, the claimant or objector proves that he had an interest in, or was possessed of the attached property on the date of attachment. The emphasis throughout these rules is on the date of attachment and not before or after it.

Where the claim to the attached property was decreed after the date of the attachment, the claimant cannot be said to have had interest in the property on the date of attachment.

Where the court releases the property from attachment, in which property the claimant has not proved his interest on the date of the attachment, the court exceeds its jurisdiction or at least exercises it illegally or with material irregularity and the case is covered by S. 115. (*Smt. Saida Begam v. Sabir Ali*, A. I. R. 1962 Allahabad, 9).

Section 47 and rule 58 of O. 21 compared.—It will thus be seen from the above that objections to attachment raised by a party to the suit in which the decree under execution was passed or his representatives fall within the scope of S. 47, while objections to attachment raised by a third party come under rule 58 of Order 21. The distinction is important in the following respects :

1. Where an objection to attachment is made by a party to the suit or his representative, the objector should proceed by an application under S. 47. It bars a separate suit so far as the question relates to the execution, discharge or satisfaction of a decree. But where an objection to attachment is made by a third party, the objector may either proceed by an application under rule 58 of Order 21, or he may bring a regular suit to establish his objection. Failure to proceed by an application under O. 21, r. 58, is no bar to a separate suit.

2. An order passed under S. 47 allowing or disallowing an objection to attachment is not a decree within the amended meaning of S. 2 (2), and is, therefore, not appealable. But orders made under Order 21, rule 58 as a result of the objections lodged under rule 58 are appealable inasmuch as the order made thereon shall have the same force as if it were a decree. A fresh suit also can be instituted where the claim or objection is not entertained by the Court under r. 58 on the ground that the claim or objection was unnecessarily delayed or the attached property had already been sold before the claim was preferred or objection made.

3. The difference as to the scope of the enquiry between a proceeding under S. 47 and the one under O. 21, r. 58, is that in the latter the enquiry is confined to the question of possession, but it is not so in the former where the enquiry involves a determination of all the questions relating to the execution, discharge or satisfaction of the decree and not mere possession.

Stay of sale.—Where before the claim is preferred or the objection was made, the property attached had already been advertised for sale, the court may—

(a) if the property is movable, make an order postponing the sale pending the adjudication of the claim or objection, or

(b) if the property is immovable, make an order that, pending the adjudication of the claim or objection, the property shall not be sold, or, that pending such adjudication, the property may be sold but the sale shall not be confirmed, and any such order may be made subject to such terms and conditions as to security or otherwise as the court thinks fit. (O. 21, r. 59).

LIMIT OF TIME FOR EXECUTION

48. Execution barred in certain cases.—¹

Period prescribed for the execution of decrees.—A decree-holder is entitled to present successive applications for the execution of the same decree unless—

(a) the application is barred by virtue of the general principles of *res judicata*, which apply to execution proceedings. The principle is that when once a question has been raised and decided or a certain construction has been put on a decree in a former execution proceeding, the decision, even if erroneous, is binding upon the parties ; or

(b) the application is barred under Art. 136 or Art. 135 of the Limitation Act (Act No. 36 of 1963). Article 136 of the Limitation Act lays down that for the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court the period of limitation is 12 years and the time from which the period begins to run is where the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods when default in making the payment or delivery in respect of which execution is sought, takes place ; provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation. Under Art. 136 of the Limitation Act the period of limitation for the enforcement of a decree granting a mandatory injunction is three years from the date of the decree or where a date is fixed for performance, such date.

Section 48 of the Code of Civil Procedure which dealt with the limit of time for execution has been repealed by S. 28 of the Indian Limitation Act, 1963.

Execution Proceedings and Res judicata.—There is a difference between the dismissal of suits and dismissal of execution applications for default when they are not pressed. In the case of dismissal of execution petitions for default or on the ground that they are not pressed, the only point that is decided is that that application is dismissed and there is no bar in the way of a fresh application being made, if necessary, the next day with the same prayer ; and unless it can be said that there was a decision or adjudication which either directly decided the question on which the parties are at issue or which must be deemed to have impliedly decided it on the ground that the order could not have been made without such implied decision having been arrived at, the rule of *res judicata* cannot operate or apply. (*Firm Lachiram Santhokchand Ameechand v. Firm Tarachand Jayarupji*, A.I.R. 1937 Mad. 289).

1. Section 48 was repealed by virtue of the provisions contained in S. 28 of the Limitation Act, 1963 (36 of 1963), which enacts that in the Code of Civil Procedure, 1908, S. 48 shall be omitted.

TRANSFEREES AND LEGAL REPRESENTATIVES

49. Transferee.—Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

50. Legal representative.—(1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of the deceased.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of ; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

PROCEDURE IN EXECUTION

51. Powers of Court to enforce execution.—Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree —

- (a) by delivery of any property specifically decreed ;
- (b) by attachment and sale or by sale without attachment of any property ;
- (c) by arrest and detention in prison for such period not exceeding the period specified in S. 58, where arrest and detention is permissible under that section ;
- (d) by appointing a receiver ; or
- (e) in such other manner as the nature of the relief granted may require :

Provided that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied—

- (a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,—
 - (i) is likely to abscond, or leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property ; or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same ; or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Explanation.— In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.

Under S. 51 issue of notice can be dispensed with only when the court would be justified in ordering the arrest of the judgment-debtor in view of sub-cl. (i) to cl. (a) to the proviso of S. 51. Notice has to be issued to the judgment-debtor whenever the grounds for the arrest of the judgment-debtor would be those mentioned in sub. cl. (ii) to cl. (a) to the proviso of S. 51, sub-cl. (b) and (c) to the proviso of S. 51.

The existence of the circumstances justifying an order for arrest should be alleged either in the execution application itself or in a separate application or affidavit which should accompany the execution application. In the absence of it, the court cannot take action under O. 21, r. 37 or issue notice to the judgment-debtor. The procedure to be followed when the judgment-debtor appears in court should be according to O. 21, r. 40, viz., the court should proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution, and should not commit him to the civil prison. It is for decree-holder to lead *prima facie* evidence in support of his application and where he has led no evidence the court cannot issue an order against the judgment-debtor. Mere non-payment to the decree-holder when the judgment-debtor came into possession of means subsequent to the date of the decree will not always be sufficient for coming to the conclusion that the judgment-debtor refused or neglected to pay the decree-holder. In the absence of evidence, which could have a bearing on these considerations, the court could not have satisfied that the judgment-debtor has refused or neglected to pay the decretal amount within the meaning of S. 51 (b) proviso. (*Harpal Singh v. Lala Hira Lal*, A. I. R. 1955 All. 402).

A court must record its reasons in writing regarding its being satisfied under S. 51, C. P. C., that the judgment-debtor had rendered himself liable to be arrested and sent to civil jail on any of the grounds mentioned therein before directing his arrest. (*Kultalalingam Pillai v. Chinnakinnu Pillai*, A. I. R. 1952 Mad. 18).

The Amendment Act, 1976, has added in cl. (c) of S. 51 of the Act, the

words "for such period not exceeding the period specified in S. 58, where arrest and detention is permissible under that section." This has been done so as to harmonise the provisions of S. 51 (c) with the provisions of S. 58 of the Code.

52. Enforcement of decree against legal representative.—(1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally.

Where a judgment-debtor dies before the decree has been fully satisfied, the decree-holder may apply to the court which passed it to execute the same against the legal representative of the deceased.

The legal representative shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of.

Where the decree passed against a legal representative of the deceased person is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of such property. But in regard to the property which came into the hands of the legal representative and which has not been duly applied by him although such property remains in the possession of the judgment-debtor, the decree may be executed against him as if the decree was to that extent passed against him personally.

In order to attract the provisions of S. 52 three conditions have to be complied with, viz., (1) the legal representative must have received the property of the deceased; (2) he must no longer be in possession of it; and (3) the court is satisfied that he has failed to duly apply the property which he had inherited to discharge the deceased's debt. (*Subbayanarayana v. Rajyalakshmi Devi Amma*, (1950) 1 M. L. J. 192).

A decree can be passed not only against the separate assets of the father in the hands of his sons but also against the share of the father in the joint family properties obtained by the sons by right of survivorship and the decree-holder is entitled to proceed against such properties. (*Sivaramiah v. Audi Reddi*, A. I. R. 1947 Mad. 357).

53. Liability of ancestral property.—For the purposes of Ss. 50 and 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has

been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

54. Partition of estate or separation of share.—Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates.

Execution in case of cross-decrees.—Cross-decrees are decrees held by the plaintiff and the defendant against each other in different suits so that a decree-holder in one suit is the judgment-debtor in the other. Such decrees are set-off against each other in execution proceedings. Thus where *A* holds a decree against *B* for Rs. 5,000 and *B* holds a decree against *A* for Rs. 3,000, both the decrees will be set-off when *A* and *B* each applies for execution of his decree to a court which has jurisdiction to execute both the decrees. *B*, the holder of the decree for the smaller amount, will not be allowed to take out execution of his decree and execution will be allowed of *A*'s decree to the extent of Rs. 2,000 only.

Where applications are made to a court for the execution of cross-decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such courts, then—

(a) if the two sums are equal, satisfaction shall be entered upon both the decrees ; and

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction of the decree for the smaller sum.

This rule shall not be deemed to apply unless—

(i) the decree-holder in one of the suits is the judgment-debtor in the other and each party fills the same character in both suits ; and

(ii) the sums due under the decrees are definite.

The above shall, however, apply where either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons. (O. 21, r. 18).

Illustrations.—(i) *A*, *B*, *C*, *D* and *E* are jointly and severally liable for Rs. 1,000 under a decree obtained by *F*. *A* obtains a decree for Rs. 100

against *F* singly and applies for execution to the court in which the joint decree is being executed. *F* may treat his joint decree as a cross-decree under this rule.

(ii) *A* holds a decree against *B* for Rs. 1,000. *B* holds a decree against *A* for the payment of Rs. 1,000 in case *A* fails to deliver certain goods at a future day. *B* cannot treat his decree as a cross-decree under this rule.

(iii) *A* and *B*, co-plaintiffs, obtain a decree for Rs. 1,000 against *C*, and *C* obtains a decree for Rs. 1,000 against *B*. *C* cannot treat his decree as a cross-decree under this rule.

(iv) *A* obtains a decree against *B* for Rs. 1,000. *C*, who is a trustee for *B*, obtains a decree on behalf of *B* against *A* for Rs. 1,000. *B* cannot treat *C*'s decree as a cross-decree under this rule.

Essential Conditions.—In order to apply the above rule to cross-decrees it is necessary that the following conditions must be fulfilled :

1. The cross-decrees must be for the payment of two sums of money ;
2. The decrees must have been obtained in separate suits ;
3. Both the decrees must be capable of execution at the same time ;
4. The decree-holder in one of the suits in which the decrees have been passed should be the judgment-debtor in the other, and each party fills the same character in both the suits ; and
5. Both the decrees must be before the executing court for execution and applications should have been made for execution of both of them.

The provisions relating to cross-decrees for the payment of money also apply to decrees for sale in enforcement of a mortgage or charge.

Cross-claims.—Where an application is made to a court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then (a) if the two sums are equal, satisfaction for both shall be entered upon the decree ; and (b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree. (O. 21, r. 19).

Under this rule the person having the decree for the smaller sum cannot execute his decree at all and hence no question of limitation can ever arise. (*Jugal Kishore v. Bhagwat Sahai*, O. W. N. 98).

Decree for payment of money.—Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed—

- (1) by the detention in the civil prison of the judgment-debtor ; or
- (2) by the attachment and sale of his property ; or
- (3) by both. (O. 21, r. 30).

Decree for specific movable property.—Decree for any specific movable property or for any share in a specific movable property may be executed—

- (1) by the seizure, if practicable, of the movable or share and by the delivery thereof to the party to whom it has been adjudged, or

- (2) by the detention in the civil prison of the judgment-debtor, or
- (3) by the attachment of his property, or
- (4) by both.

When any attachment of property has remained in force for six months and the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the court may award to the decree-holder the amount fixed by the decree, or compensation, in cases where no amount has been fixed by the decree to be paid as an alternative to delivery of movable property, as the court thinks fit. The balance, if, any may be paid to the judgment-debtor on his application.

Where the judgment-debtor has obeyed the decree and paid all costs of executing the same or where, at the end of three months from the date of attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease. (O. 21, r. 31).

Decree for specific performance and injunction.—The decree in the case of a party against whom a decree for the specific performance of a contract or for an injunction has been passed and who has wilfully failed to obey when he has had an opportunity of obeying it may be enforced by the attachment of his property or by his detention in the civil prison or by both.

Where the party in default is a corporation the decree may be enforced by the attachment of the property of the corporation or, with the leave of the court, by the detention in the civil prison of the directors or other principal officer thereof, or by both attachment and detention.

When the attachment has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold and the court may award to the decree-holder such compensation as it thinks fit out of the proceeds and pay the balance to the judgment-debtor on his application.

Where the judgment-debtor has obeyed the decree and paid all cost of executing the same or if, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.

Where the decree has not been obeyed, the court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder at the cost of the judgment-debtor, and the expenses may be recovered as if they were included in the decree. (O. 21, r. 32).

Decree for restitution of conjugal rights.—Where the party against whom a decree for restitution of conjugal rights has been passed has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced by the attachment of his property.

Where the attachment has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold and the court may award to the decree-holder such compensation as it thinks fit out of the proceeds and pay the balance, if any, to the judgment-debtor on his application.

Where the judgment-debtor has obeyed the decree and paid all costs of executing the same or if, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease. (O. 21, r. 32).

Notwithstanding anything said above, where a decree against a husband for the restitution of conjugal rights has been passed, the court may order that, in the event of the decree not being obeyed within a fixed period, the judgment debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments. Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money. (O. 21, r. 33).

Decree for execution of a conveyance or endorsement of negotiable instrument.—Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the court shall, on the decree-holder delivering to it a draft of the document or endorsement in terms of the decree, serve it on the judgment-debtor with a notice to make written objections within a time fixed therein. On considering the objection, if any, the court may determine the draft. On the decree-holder's delivering to the court a copy of the draft with the alterations directed by the court incorporated therein, upon the proper stamp-paper, the Judge or the officer appointed by him in this behalf shall execute or endorse it as under :

“C. D., Judge of the Court of.....(for as the case may be), for A. B., in a suit by E. F. against A. B.”

It shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

The court shall cause it to be registered if required by law, or if desired by the decree-holder.

An appeal lies from an order on an objection to a draft conveyance or endorsement.

Where the registration of the document is required under any law for the time being in force, the court, or such officer of the court as may be authorised in this behalf by the court, shall cause the document to be registered in accordance with such law. Where the registration of the document is, however, not so required, but the decree-holder desires it to be registered, the court may make such order as it thinks fit. Where the court makes any order for the registration of any document, it may make such order as it thinks fit as to the expenses of registration. (O. 21, r. 34).

Decree for immovable property.—When a decree is for the delivery of any immovable property, possession thereof shall be delivered to the decree-holder, and, if necessary, by removing any person bound by the decree who refuses to vacate the property. For putting the decree-holder in possession of a building or enclosure, the court may, when the person does not afford free access, after giving facility to any woman not appearing in public to withdraw, order that any lock or bolt be removed or opened, any door be broken open, or any other necessary act be done. This is termed as delivering actual or *khas* possession. (O. 21, r. 35).

When in occupancy of tenant.—When the immovable property is in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property. The possession thus delivered is called symbolical or formal possession. (O. 21, r. 36).

Joint Possession.—Delivery of joint possession of immovable property as opposed to actual possession of immovable property is by the same mode as discussed in the preceding paragraph, *i. e.*, where the immovable property is in the occupancy of a tenant. (O. 21, r. 35).

Execution of Decree against Firm.—Where a decree has been passed against a firm, execution may be granted (a) against any property of the partnership ; (b) against any person who has appeared in his own name or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner ; and (c) against any person who has been individually served as a partner with a summons and has failed to appear.

Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than a person referred to above as being a partner in the firm, he may apply to the court, which passed the decree, for leave, and, where the liability is not disputed, such court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined. When such liability has been tried and determined, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree. (O. 21, r. 50).

ARREST AND DETENTION

55. Arrest and detention.—(1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the State Government may appoint for the detention of persons ordered by the Courts of such district to be detained :

Provided, firstly, that for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise :

Provided, secondly, that no outer-door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make

the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found :

Provided, thirdly, that if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer authorised to make the arrest shall give notice to her that she is at liberty to withdraw and after allowing a reasonable time for her to withdraw, and, giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest :

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The State Government may, by notification in the Official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the State Government in this behalf.

(3) Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he may be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

(4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceedings upon the application or upon the decree in execution of which he was arrested, the Court may release him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realised or commit him to the civil prison in execution of the decree.

A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, except that—

(1) for the purpose of making an arrest no dwelling-house shall be entered after sunset and before sunrise ;

(2) no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorised to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found ;

(3) if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw and allow her a reasonable opportunity to withdraw therefrom before entering the room for the purpose of making the arrest ;

(4) if the decree is for the payment of money, no arrest shall be made if the judgment-debtor pays the full decretal amount and the costs of the arrest to the officer arresting him.

Notice before arrest.—In an application for the execution of a decree for the payment of money by the arrest of the judgment-debtor the court has a discretion to issue a notice in place of a warrant calling upon him to show cause why he should not be committed to the civil prison unless with the object of delaying the execution of the decree he is likely to abscond or leave the local limits of the jurisdiction of the court. If he does not appear in obedience to the notice the warrant may issue. When the judgment-debtor appears the court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution, and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison. (O. 21, rr. 37 and 40).

The State Government may, by notification in the Official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the State Government in this behalf. [S. 55 (2)].

Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the court, the court shall inform him that he may apply to be declared an insolvent and on his expressing an intention to apply and furnishing security to the satisfaction of the court, that he will within one month so apply and that he will appear, when called upon, in the insolvency court or the executing court, may release him from arrest, and, if he fails so to apply and to appear, the court may either realise the security or commit him to the civil prison in execution of the decree. [S. 55 (3 and 4)].

56. Prohibition of arrest or detention of women in execution of decree for money.—Notwithstanding anything in this Part, the Court shall not order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money.

A woman shall not be arrested in execution of a decree for the payment of money.

57. Subsistence allowance.—The State Government may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors.

A judgment-debtor shall not be arrested in execution of decree unless and until the decree-holder pays into court an amount fixed by the Judge sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the court. The monthly allowance fixed by the court shall be supplied by the decree-holder by monthly payments in advance before the first day of each month. (O. 21, r. 39).

58. Detention and release.—(1) Every person detained in the civil prison in execution of a decree shall be so detained,—

(a) where the decree is for the payment of a sum of money exceeding one thousand rupees, for a period not exceeding three months, and,

(b) where the decree is for the payment of a sum of money exceeding five hundred rupees, but not exceeding one thousand rupees, for a period not exceeding six weeks :

Provided that he shall be released from such detention before the expiration of the said period of detention,—

(i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or

(ii) on the decree against him being otherwise fully satisfied, or

(iii) on the request of the person on whose application he has been so detained, or

(iv) on the omission by the person, on whose application he has been so detained, to pay subsistence allowance :

Provided, also, that he shall not be released from such detention under clause (ii) or clause (iii), without the order of the Court.

(1-A) For the removal of doubts, it is hereby declared that no order for detention of the judgment-debtor in civil prison in execution of a decree for the payment of money shall be made, where the total amount of the decree does not exceed five hundred rupees.

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison.

The Amendment Act, 1976, has in view of the fall in the value of money raised the monetary limit of a decree in execution of which the judgment-debtor can be detained. The period of detention in the civil prison in execution of a decree shall exceed three months where the decree is for the payment of a sum of money exceeding one thousand rupees and not exceeding six weeks where the decree is for the payment of a sum of money exceeding Rs. 500/- but not exceeding Rs. 1,000/-. But he shall be released earlier (a) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or (b) on the decree against him being otherwise fully satisfied, or (c) on the request of the decree-holder, or (d) on the omission of the decree-holder to pay the subsistence allowance.

A judgment-debtor so released from detention shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison. No order for detention of the judgment-debtor in civil prison in execution of a decree for the payment of money shall be made where the total amount of the decree does not exceed Rs. 500.

59. Release on ground of illness.—(1) At any time after a warrant for the arrest of a judgment-debtor has been issued, the Court may cancel it on the ground of his serious illness.

(2) Where a judgment-debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison.

(3) Where a judgment-debtor has been committed to the civil prison, he may be released therefrom—

(a) by the State Government, on the ground of the existence of any infectious or contagious disease, or

(b) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested, but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by S. 58.

The court may at any time cancel a warrant of arrest against the judgment-debtor on the ground of his serious illness or release him where he has been arrested. The State Government may also release him on the ground of the existence of any infectious or contagious disease, but in case of release on the ground of illness he is liable to re-arrest.

[Sections 135 and 135-A]

Exception from arrest under civil process.—The following persons are exempt from arrest under civil process :

(1) Judge, Magistrate or other judicial officer while going to, presiding in, or returning from, his Court. [S. 135 (1)].

(2) The parties, their pleaders, mukhtars, revenue agents and witnesses acting in obedience to a summons while going to or attending a tribunal *except* (i) under a process issued by such court for contempt of court, or (ii) where there is an order for immediate execution, or (iii) where the judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree. [S. 135 (2) and (3)].

(3) (a) A member of—(i) either House of Parliament, or (ii) the Legislative Assembly or Legislative Council of a State or (iii) a Legislative Assembly of a Union territory, during the continuance of any meeting of such House of Parliament or, as the case may be, of the Legislative Assembly or the Legislative Council ;

(b) a member of any committee of—(i) either House of Parliament, or (ii) the Legislative Assembly of a State or Union territory, or (iii) the Legislative Council of a State, during the continuance of any meeting of such committee ;

(c) a member of—(i) either House of Parliament, (ii) a Legislative Assembly or Legislative Council of a State having both such Houses,

during the continuance of a joint sitting, meeting, conference or joint committee of the Houses of Parliament or Houses of the State Legislature, as the case may be ;

and during the forty days before and after such meeting, sitting or conference. (S. 135-A).

Arrest before judgment.—Please see notes on Supplemental Proceedings, Part VI, bearing discussion on the same topic and printed subsequently.

ATTACHMENT

60. Property liable to attachment and sale in execution of decree.—The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment-debtor or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf :

Provided that the following particulars shall not be liable to such attachment or sale, namely—

(a) the necessary wearing apparel, cooking vessels, beds, and bedding of the judgment-debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman ;

(b) tools of artisans, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section ;

(c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist or a labourer or domestic servant and occupied by him ;

(d) books of account ;

(e) a mere right to sue for damages ;

(f) any right of personal service ;

(g) stipends and gratuities allowed to pensioners of the Government or of a local authority or of any other employer or payable out of any service family pension fund notified in the Official Gazette by the Central Government or the State Government in this behalf, and political pensions ;

(h) the wages of labourers and domestic servants, whether payable in money or in kind ;

(i) salary to the extent of the first four hundred rupees and two-thirds of the remainder in execution of any decree other than a decree for maintenance ;

Provided that where any part of such portion of the salary as is liable to attachment has been under attachment, whether continuously or intermittently for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months, and, where such attachment has been made in execution of one and the same decree, shall after the attachment has continued for a total period of twenty-four months, be finally exempt from attachment in execution of that decree ;

(i-a) one-third of the salary in execution of any decree for maintenance ;

(j) the pay and allowances of persons to whom the Air

Force Act, 1950, or the Army Act, 1950, applies, or the Navy Act, 1959, applies ;

(k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1925, for the time being applies in so far as they are declared by the said Act not to be liable to attachment ;

(k-a) all deposits and other sums in or derived from any fund to which the Public Provident Fund Act, 1968, for the time being applies, in so far as they are declared by the said Act as not to be liable to attachment ;

(k-b) all moneys payable under a policy of insurance on the life of the judgment-debtor ;

(k-c) the interest of a lessee of a residential building to which the provisions of law for the time being in force relating to control of rents and accommodation apply ;

(l) any allowance forming part of the emoluments of any servant of the Government or of any servant of a railway company or local authority which the appropriate Government may by notification in the official Gazette declare to be exempt from attachment, and any subsistence grant or allowance made to any such officer or servant while under suspension ;

(m) an expectancy of succession by survivorship or other merely contingent or possible right or interest ;

(n) a right to future maintenance ;

(o) any allowance declared by any Indian law, to be exempt from liability to attachment or sale in execution of a decree ; and

(p) where the judgment-debtor is a person liable for the payment of land-revenue, any movable property which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

Explanation I.—The moneys payable in relation to the matters mentioned in clauses (g), (h), (i), (ia), (j), (l), and (o) are exempt from attachment or sale, whether before or after they are actually payable, and, in the case of salary, the attachable portion thereof is liable to attachment, whether before or after it is actually payable.

Explanation II.—In clauses (i) and (ia), 'salary' means the total monthly emoluments, excluding any allowance declared

exempt from attachment under the provisions of clause (1), derived by a person from his employment whether on duty or on leave.

Explanation III.—In clause (1) “appropriate Government” means—

(i) as respects any person in the service of the Central Government, or any servant of a Railway Administration or of a cantonment authority or of the port authority of a major port, the Central Government ;

[* * * * *]

(iii) as respect any other servant of the Government or a servant of any other local authority, the State Government.

Explanation IV.—For the purposes of this proviso, “wages” includes bonus, and “labourer” includes a skilled, unskilled or semi-skilled labourer.

Explanation V.—For the purposes of this proviso, the expression ‘agriculturist’ means a person who cultivates land personally and who depends for his livelihood mainly on the income from agricultural land, whether as owner, tenant, partner or agricultural labourer.

Explanation VI.—For the purposes of Explanation V, an agriculturist shall be deemed to cultivate land personally, if he cultivates land—

(a) by his own labour, or

(b) by the labour of any member of his family, or

(c) by servants or labourers on wages payable in cash or in kind (not being as a share of the produce), or both.

(ia) Notwithstanding anything contained in any other law for the time being in force, an agreement by which a person agrees to waive the benefit of any exemption under this section shall be void.

(2) Nothing in the section shall be deemed to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for

1. Clause (ii) of Explanation 3 was omitted by Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948.

their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building, site or land.

In view of the merger of dearness allowance with the pay, the attachable portion of the salary in execution of a decree has increased. In the Code of Civil Procedure (Amendment) Act, 1976, has, with a view to alleviating, the hardship likely to be caused by the increase in the attachable portion of the salary (a substantial part of which was not previously attachable), raised the limit of exemption from attachment of a salary in execution of a decree to rupees four hundred and two-thirds of remainder of the salary. Sub-cl. (i) of S. 60 (1) has accordingly been amended so as to :

Provided that salary to the extent of the first four hundred rupees and two-thirds of the remainder in execution of any decree other than a decree for maintenance is not attachable. Further, where any part of such portion of the salary as is liable to attachment has been under attachment, whether continuously or intermittently, for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months, and where such attachment has been made in execution of one and the same decree, shall, after the attachment has continued for a total period of twentyfour months, be finally exempt from attachment in execution of that decree.

Under the provisions of cls. (ka) and (kb) to sub-s. (1) of S. 60 it has been enacted that deposit under the Public Provident Fund Act, 1968 and all moneys payable under a policy of insurance on the life of the judgment-debtor are exempt from attachment.

In Explanation IV in the definition of 'labourer' unskilled labourer has also been included. Further under Explanations V and VI an agriculturist for the purpose of being granted exemption from attachment under the provisions of the Code, means a person who cultivates land personally or through his labour or the labour or any member of his family or the servants or labourers on wages payable in cash or in kind, and who depends for his livelihood mainly on the income from agriculture.

Protection of S. 60.—It is not open to a judgment-debtor to waive the protection which S. 60, C. P. C., gives him, and an agreement or compromise which has that effect is not enforceable in law and is, therefore, void. (*Harnam Singh v. Ramji Das*, 52 P. L. R. 321).

Meaning of Property.—A right to purchase shares for an agreed consideration or even an option to do so is a right to property under a completed contract. Such a right is a beneficial interest in movable property, which is itself movable property, assignable and transferable. The benefit under the contract is not made non-assignable by a mere condition that for the purchase of the shares certain consideration has to be paid. Such a right can also be subject-matter of an attachment.

Meaning of tools.—The term 'tools' occurring in S. 60 (1) (b) includes not only simple instruments but also complicated mechanical implements (such as a cutting press, a machine for processing plates and pieces of dies used by a goldsmith) used by artisans for purpose of their trade.

A goldsmith is an artisan because he is a handicraftsman who is engaged in one of the industrial arts of trade and makes a living by selling articles

which he makes. (*T. R. Punnavanam v. V. Muthuswami*, A. I. R. 1962 Madras, 444).

Who is agriculturist ?—The object of S. 60 (1) (c) is to afford protection to the class of persons who engage themselves in the tilling of the soil and whose livelihood depends upon the proceeds derived from that tilling of the soil. (*Bura Ram v. Gurbachana*, A. I. R. 1954 Pun. 254). It is not necessary that the person claiming the benefit of S. 60 (1) (c), C. P. C. must himself or herself actually cultivate the land. That the whole of the cultivation is carried on through paid servants does not make him or her any the less an agriculturist within the meaning of S. 60 (1) (c), if he or she is still dependent upon the lands. (*Prabhakara Patabhi Rama Rao v. Venkata Subbanna*, A. I. R. 1952 Mad. 807). This is further borne out from the Explanations V and VI added to S. 60 by the Amendment Act, 1976.

Where it is admitted that the judgment-debtors are agriculturists and that they have no other house in their occupation it is an inevitable conclusion that they are occupying the house for agricultural purposes and no further evidence is needed on the point. Where the attachment was made before judgment, it is not invalid under S. 60 (c), C. P. C., which forbids attachment "in execution of a decree" and therefore an order of the court directing the attachment to continue till the debt is paid off does not contravene any provision of law. (*Ram Nares v. Ganesh Mistri*, A. I. R. 1952 All 680).

The Allahabad High Court has held that the receipt of pension by a retired soldier or policeman would not affect his status as an agriculturist and he would be entitled to the protection given by S. 60 (c), C. P. C., which prohibited the attachment or sale of a house and other buildings belonging to an agriculturist and occupied by him. There was no reason to limit the scope of the protection given by S. 60 (c) to those whose main source of income was derived from the cultivation of land. The intention of the legislature obviously was to preserve and promote the efficient cultivation of the land, that is to say, to encourage agriculture which is the main industry of this country. In that view of the matter, there was no reason to deprive a person of the benefit and protection of this provision, if he fulfilled the test of a person engaged in agriculture and also had other sources of income such as pension or profit from investment.

It is not necessary that a person, in order to qualify as an agriculturist within the meaning of S. 60 (c) must show that agriculture is the main source of livelihood. He is under no obligation to prove that he is a prosperous or successful agriculturist. Such an interpretation is not warranted by the word 'agriculturist' and would result in great injustice to poor agriculturists.

As long as a person remains in the village and cultivates his land, he has the status of an agriculturist and is entitled to the protection of S. 60 (c), C. P. C., whatever the size of his side income. Residence in the village plus cultivation is strong proof that a person has not abandoned his calling of agriculturist, whatever his other sources of income. When the above conditions are satisfied, the receipt of a pension, however large, does not deprive a person of the status of an agriculturist. (*Shiamlal v. Smt. Sahodra Devi*, 1960 A. L. J. 177).

Right to receive offerings.—The right of the judgment-debtor to receive offerings from Kalkaji temple in Delhi cannot be sold in execution of a decree under S. 60 (1) (f), C. P. C. (*Harparshad v. Prem Singh*, A. I. R. 1952 Pun. 138).

Gratuity.—Gratuity amount due from a postal department to the heirs of a deceased judgment-debtor is exempt from attachment under S. 60 (1) (g), C. P. C. (*Subramanya Iyer v M. Hyder*, I. L. R. 1955 Mys. 419).

Maintenance to wife.—Under Section 60 (1) (n) of the Code of Civil Procedure, a right to future maintenance is not attachable. This is analogous to S. 6 (dd) of the Transfer of Property Act which says that a right to future maintenance cannot be transferred. Once the maintenance amount has accrued, and especially when the same is deposited into Court, the money so accrued or deposited does not remain a mere right to future maintenance. Both under S. 60 (1) (n) of the Code of Civil Procedure and S. 6 (dd) of the Transfer of Property Act, what is not attachable or transferable as the case may be, is not 'future maintenance', but 'right to future maintenance'. Once the right is exercised and the same fructifies into a quantified amount which has actually come into Court, it cannot be called a mere right to future maintenance. In such a contingency the right transforms into cash. Once that stands to the credit of the respondent, it is attachable.

What is further maintenance at a particular time would become arrears of maintenance at a later point of time. Maintenance which has accrued and is in arrears can never be described as a mere right to future maintenance. The maintenance-holder can dispose it of otherwise and on the person dying intestate the amount would go only to the legal representatives.

The fact that a right for maintenance is only a personal right to the person on whom the right is conferred either by a decree of civil court or order of a criminal court or otherwise has nothing to do with the question of maintenance which had accrued and is in arrears; such amount is the property of the person who is entitled to get the maintenance. [*R. Swaminathan v. Annammal*, (1975) 1 M. L. J., 328].

Provident Fund.—The provident fund of the judgment-debtor (a railway employee) is not liable to attachment having regard to the provisions of S. 60, Civil Procedure Code, and S. 3 of the Provident Funds Act. Even if the debtor agrees to the attachment of his salary waiving the rights conferred on him by C. P. C., still the attachment is illegal and should be raised, as such an agreement is opposed to public policy, void and unenforceable. (*M. & S. M. Railway v. Chengali Sydalli*, A. I. R. 1950 Mad. 402).

Attachment of movable property.—Where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure and the attaching officer shall keep the same in his own custody, but if it is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once. (O. 21, r. 43).

Where the movable property is not in possession of the judgment-debtor, the attachment shall be made by a written order prohibiting the person in possession of the same from giving it over to the judgment-debtor.

Attachment of agricultural produce.—Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment—(a) where such produce is a growing crop, on the land on which crop has grown, or (b) where such produce has been cut or gathered, on the threshing-floor or fodder-stack on or in which it is deposited, and

another copy on the outer door or some other conspicuous part of the house in which the judgment-debtor ordinarily resides, or, with the leave of the court, where he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall thereupon be deemed to have passed into the possession of the court. (O. 21, r. 44).

61. Partial exemption of agricultural produce.—The State Government may, by general or special order published in the official Gazette, declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the State Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment-debtor and his family, shall, in the case of all agriculturists or of any class of agriculturists, be exempted from liability to attachment or sale in execution of a decree.

62. Seizure of property in dwelling house.—(1) No person executing any process under this Code directing or authorising seizure of movable property shall enter any dwelling-house after sunset and before sunrise.

(2) No outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be.

(3) Where a room in a dwelling-house is in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw; and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.

Attachment of debt and share.— In the case of (a) a debt not secured by a negotiable instrument, (b) a share in the capital of a corporation, the attachment shall be made by a written order prohibiting.—

(i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the court;

(ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon.

A copy of such order shall be affixed on some conspicuous part of the court-house and another copy shall be sent in the case of the debt to the debtor, and in the case of the share, to the proper officer of the corporation. (O. 21, r. 46).

Attachment of share in movables.—Where the property to be attached consists of the share or interest of the judgment-debtor in movable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way. (O. 21, r. 47).

Attachment of salary or allowances.—Where the property to be attached is the salary or allowances of a servant of the Government or of a servant of a railway company or local authority or of a servant of a corporation engaged in any trade or industry which is established by a Central, Provincial or State Act, or a Government company as defined in the Companies Act, 1956, the attachment shall be made by the court by making an order that the amount shall, subject to the provisions of S. 60 of the Code (property not liable to attachment and sale in execution of a decree), be withheld from such salary or allowances either in one payment or by monthly instalments. The disbursing officer shall then withhold and remit to the court the amount due under the order or the monthly instalments. (O. 21, r. 48).

Order 21, r. 48A of the Code of Civil Procedure provides that where the property to be attached is the salary or allowances of an employee other than an employee to whom rule 48 applies, (*viz.*, a servant of the Government, a railway company or local authority or a servant of a corporation engaged in any trade or industry which is established by a Central, Provincial or State Act, or a Government company), the court, where the disbursing officer of the employee is within the local limits of the court's jurisdiction, may order that the amount shall, subject to the provisions of S. 60 be withheld from such salary or allowances either in one payment or by monthly instalments as the court may direct; and upon notice of the order to such disbursing officer, such disbursing officer shall remit to the court the amount due under the order, or the monthly instalments, as the case may be.

Where the attachable portion of such salary or allowances is already being withheld or remitted to the court in pursuance of a previous and unsatisfied order of attachment, the disbursing officer shall forthwith return the subsequent order to the court issuing it with a full statement of all the particulars of the existing attachment.

Every order made under this rule, unless it is occurred in accordance with the aforesaid provisions, shall, without further notice or other process, bind the employer while the judgment-debtor is within the local limits to which this Code extends and while he is beyond those limits, if he is in receipt of salary or allowances payable out of the funds of an employer in any part of India; and the employer shall be liable for any sum paid in contravention of this rule.

Attachment of partnership property.—Property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

The court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits, appoint a receiver of the share of such partner in the

profits, and direct accounts and inquiries and make an order for the sale of such interest.

The other partner or partners shall be at liberty to redeem the interest charged or, in the case of a sale being directed, to purchase the same. (O. 21, r. 49).

Negotiable Instruments.—Where the property is a negotiable instrument not deposited in a court, nor in the custody of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into court and held subject to further orders of the court. (O. 21, r. 51).

Property in the custody of court or public officer.—Where the property to be attached is in the custody of any court or public officer, the attachment shall be made by a notice to such court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the court from which notice is issued. (O. 21, r. 52)

Attachment of decrees.—Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made,—

(a) if the decrees were passed by the same court, then by order of such court ; and

(b) if the decree sought to be attached was passed by another court, then by the issue to such other court of a notice by the court which passed the decree sought to be executed, requesting such other court to stay the execution of its decree unless and until—

(i) the court which passed the decree sought to be executed cancels the notice, or

(ii) (a) the holder of the decree sought to be executed, or (b) his judgment-debtor with the evious consent in writing of such decree-holder or with the previous permission of the attaching court, applies to the court receiving such notice to execute its own decree.

Where a court makes an order under clause (a) or receives an application under sub-head (ii) of clause (b), it shall, on the application of the creditor who has attached the decree or his judgment-debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to above, the attachment shall be made by a notice by the court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way ; and, where such decree has been passed by any other court, also by sending to such other court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the court from which it was sent. [O. 21, r. 53].

Immovable property.—Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge.

The order shall also require the judgment-debtor to attend court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale.

The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order affixed on a conspicuous part of the property and the court house, and in case of land paying revenue to the Government in the office of the Collector of the district in which the land is situate, and where the property is land situate in a village, also in the office of the Gaon Panchayat, if any, having jurisdiction over that village (O. 21, r. 54).

Removal of attachment after satisfaction of the decree.—Where the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into court, or satisfaction of the decree is otherwise made through the court or certified to the court, or the decree is set aside or reversed, the attachment shall be deemed to be withdrawn. (O. 21, r. 55).

63. Property attached in execution of decrees of several Courts.—(1) Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.

Explanation—For the purposes of sub-section (2), “proceeding taken by a Court” does not include an order allowing, to a decree-holder who has purchased property at a sale held in execution of a decree, set off to the extent of the purchase price payable by him.

Investigation of claims and objections.—Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained :

Provided that no such claim or objection shall be entertained—

(a) Where before the claim is preferred or objection is made, the property attached has already been sold ; or

(b) Where the court considers that the claim or objection was designedly or unnecessarily delayed. [O. 21, r. 53 (1)].

All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the court dealing with the claim or objection and not by a separate suit.

Upon the determination of the questions the court shall in accordance with such determination,—(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or (b) disallow the claim or objection; or (c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or (d) pass such order as in the circumstances of the case it deems fit. [O. 21, r. 58 (3)].

Where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree. [O. 21, r. 58 (4)].

Where a claim or an objection is preferred and the court under the proviso to sub-r. (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive. [O. 21, r. 58 (5)].

Order 21, rule 58 has been discussed along with S. 47 earlier at pages 152 to 159 and needs no reiteration.

Evidence to be adduced by claimant.—The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

Garnishee Order.—Garnishee means a judgment-debtor's debtor. He is a person who is liable either to pay a debt to a judgment-debtor or to deliver or account for any movable property not in the possession of the judgment-debtor. The debt must be one other than a debt secured by a mortgage, a charge, a negotiable instrument, or a debt recoverable only in a revenue court.

A garnishee order is an order which a court is authorised to make against a garnishee (judgment-debtor's debtor) requiring him to pay or deliver into court the amount due from or the property deliverable by him to the judgment-debtor or so much as may be sufficient to satisfy the decree and the cost of execution.

The court may in the case of a debt (other than a debt secured by a mortgage or a charge) which has been attached under r. 46 (attachment of debt, share and other property not in possession of judgment-debtor) upon the application of the attaching creditor, issue notice to the garnishee liable to pay such debt, calling upon him either to pay into court the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so. The application shall be made on affidavit verifying the facts alleged and stating that, in the belief of the deponent, the garnishee is indebted to the judgment-debtor.

Where the garnishee pays in the court the amount due from him to the judgment-debtor or so much thereof as is sufficient to satisfy the decree and the costs of the execution, the court may direct that the amount may be paid to the decree-holder towards satisfaction of the decree and costs of the execution, (O. 21, r. 46A).

Where the garnishee does not forthwith pay into court the amount due from him to the judgment-debtor or so much thereof as is sufficient to satisfy the decree and the costs of execution, and does not appear and show cause in answer to the notice, the court may order the garnishee to comply with the terms of such notice, and on such order, execution may issue as though such order were a decree against him. (O. 21, r. 46B).

Where the garnishee disputes liability, the court may order that any issue or question necessary for the determination of liability shall be tried as if it were an issue in a suit, and upon the determination of such issue shall make such order or orders as it deems fit. (O. 21, r. 46C).

Provided that if the debt in respect of which the application under r. 46A is made is in respect of a sum of money beyond the pecuniary jurisdiction of the court, the court shall send the execution case to the court of the District Judge to which the said court is subordinate, and thereupon the court of the District Judge shall deal with it in the same manner as if the case had been originally instituted in that court. (Proviso to r. 46C, O. 21).

Procedure where debt belongs to third person.—Where it is suggested or appears to be probable that the debt belongs to some third person, or that any third person has a lien or charge on, or other interest in, such debt, the court may order such third person to appear and state the nature and particulars of his claim, if any, to such debt and prove the same. (O. 21, r. 46D).

After hearing such third person and any person or persons who may subsequently be ordered to appear, or where such third or other person or persons do not appear when so ordered, the court may make such order as is hereinbefore provided, or such other order or orders upon such terms, if any, with respect to the lien, charge or interest, as the case may be, of such third or other person or persons as it may deem fit and proper. (O. 21, r. 46E).

Payment by garnishee to be valid discharge.—Payment made by the garnishee on notice under r. 46A or under any such order as aforesaid shall be a valid discharge to him as against the judgment-debtor and any other person ordered to appear as aforesaid for the amount paid or levied, although the decree in execution of which the application under r. 46A was made or the order passed in the proceedings on such application, may be set aside or reversed. (O. 21, r. 46F).

The costs of any application made under r. 46A and of any proceeding arising therefrom or incidental thereto shall be in the discretion of the court.

An order made under r. 46B, r. 46C or r. 46E shall be appealable as a decree.

64. Private alienation of property after attachment to be void.—Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation.—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

Requirements of the section.—For the interdiction against alienation to have effect and invalidate private transfer of an attached property under S. 64,

C. P. C., the requirement is that the attachment must have been 'made'. For S. 64 to have effect the mere fact that an order of attachment has been passed is not sufficient. The order is only the beginning and not the end of attachment and till there is punctilious observance of the requirements of the Code of Civil Procedure, as to the attachment, an attachment cannot be said to have been 'made' and S. 64 will have no application. Thus, in the case of attachment of immovable property the attachment to have the effect of invalidating private sale under S. 64, all the requirements of O. 21, r. 54 of the Code of Civil Procedure have to be strictly adhered to and punctiliously followed. The directions as to the mode of attachment in O. 21, r. 54 cannot be construed as merely directory. As to whether a provision in a statute is mandatory or merely directory, no universal rule can be laid down and the court will have to get at the real intention of the legislature by carefully considering the whole scope of the provision, the object intended and its effect on the right of the parties.

With reference to every one of the steps to be taken under O. 21, r. 54 (2) the language used is imperative. The object of the provisions is to protect *bona fide* transferees from the penal provisions of S. 64 of the Code of Civil Procedure. The requirements are insisted upon as protection for safeguarding of the right of property. An attachment not only prohibits the judgment-debtor from transferring his properties, but there is an interdiction against the public generally from taking benefit under any transfer from the judgment-debtor.

Any purchaser for consideration however *bona fide* and even though he be totally unaware of the attachment, would after attachment had been made of the property take it subject only to the claim enforceable under the attachment. There is an embargo on the acquisition and enjoyment of property after an attachment even though there may be no actual notice of the attachment, notice being only constructive to be inferred from the promulgation of the order of attachment as provided for under O. 21, r. 54 (2). This is a restriction on the fundamental rights in property: it may be reasonable in the context, but as in all restrictions its application must be strictly within the letter of the law. The requirements of O. 21, r. 54 (1) and (2) are therefore mandatory and everyone of the prescribed things must be done before an attachment could be said to have been 'made' for S. 64 of the Code to come into operation. (*Padmavathi Ammal v. M. Maruthachalam Pillai*, I.L. R. (1966) 1 Mad. 600).

Private transfers of the attached property only affected.—The above section refers only to private transfer of the attached property by the judgment-debtor and not to a sale in execution of a decree, and is intended to prevent fraud on the decree-holder and also to preserve intact the rights of the attaching creditor against attached property by prohibiting private alienation pending litigation. (*Dinobandhu Shaw Chowdhry v. Jogmaya Dasi*, 29 Cal. 154).

Section 64 hits, as said above, only private transfer or delivery of property attached or of any interest therein. The passing of a decree by a court of law declaring a charge on such property or the court sale and delivery of the property in execution of such a decree can in no sense be said to be a private transfer or delivery of the property or of any interest therein. (*Nilkanta Iyer v. Parameswara Kurup*, I. L. R. 1953 T. C. 936).

The attachment merely prevents and avoids alienation and confers no right on the attaching creditor. (*Krishnaswamy Mudaliar v. Official Assignee of Madras*, 26 Mad. 678). Nor does it affect subsisting equitable rights which could be enforced against the property at the date of the attachment.

It has, however, to be clearly understood that a private transfer does not avoid transactions which in no way prejudice the executing creditor. (*Dinobondhu Shaw Choudhary v. Jogmaya Dasi*, 29 Cal. 154). It is not altogether void but is only subject to a sale that may be effected pursuant to attachment. Alienation pending attachment is inoperative only as regards the attaching creditor.

SALE AND DELIVERY OF PROPERTY

Power to order property attached to be sold.—Any court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same. (O. 21, r. 64).

Procedure regarding sale.—Sales in execution of decrees are conducted by any officer of the court and are made by public auction or through a broker at the market rate in the case of a negotiable instrument or share in a corporation. (O. 21, rr. 65 and 76).

In case of sale by public auction in execution of a decree, the sale proclamation is made in the language of the court. [O. 21, r. 66 (1)]. The sale proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale. The sale proclamation shall also specify as fairly and accurately as possible—(a) the property to be sold, or, where a part of the property would be sufficient to satisfy the decree, such part; (b) the revenue assessed on it, (c) any incumbrance to which it is liable, (d) the amount for the recovery of which the sale is ordered; and (e) every other thing which the court considers material for a purchaser to enable him to judge of the nature and value of the property: [O. 21, r. 66 (2)].

A review of the authorities as well as the amendments to r. 66 (2) (e) of O. 21, Civil Procedure Code, by different High Courts make it abundantly clear that the Court, when stating the estimated value of the property to be sold, must not accept merely the *ipse dixit* of one side. It is certainly not necessary for it to state its own estimate. If this were required, it may, to be fair, necessitate insertion of some thing like a summary of a judicially considered order, giving its grounds, in the sale proclamation, which may confuse bidders. It may also be quite misleading if the Court's estimate is erroneous. Moreover, r. 66 (2) (e) of O. 21 requires the Court to state only the facts it considers material for a purchaser to judge of the value and nature of the property himself. Hence, the purchaser should be left to judge the value for himself. But, essential facts which may have a bearing on the very material question of value of the property and which would assist the purchaser in forming his own opinion must be stated. That is, after all, the whole object of O. 21, r. 66 (2) (e). The Court has only to decide what all these material particulars are in each case. That is an obligation imposed by r. 66 (2) (e). In discharging it, the Court should normally state the valuation given by both the decree-holder as well as the judgment-debtor where they have both valued the property, and these do not appear fantastic. It may

usefully state any other material facts, such as the area of land, nature of rights in it, municipal assessment, actual rents realised which could reasonably be expected to affect valuation. What could be reasonably and usefully stated succinctly in a sale proclamation has to be determined on the facts of each particular case. Inflexible rules are not desirable on such a question. [*Gajadhar Prasad v. Babu Bhakta Ratan*, (1973) II S. C. J., 570, 575].

Every proclamation is made and published by beat of drum or other customary mode at some place on or adjacent to the property. A copy of the proclamation is affixed on a conspicuous part of the property and of the court house and in the Collector's office, where the property is revenue paying land. Where the court so directs, such proclamation shall also be published in the official Gazette or in a local newspaper or both. Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot unless proper notice of the sale cannot, in the opinion of the court, otherwise be given, (O. 21, r. 67).

It is no doubt not easy to draw the line between irregularity and illegality in an execution sale, but where a substantial provision like O. 21, r. 66 of the Code is violated the sale should be regarded as having been illegally conducted and would be void. The object of O. 21, r. 66, is to afford a security for the fairness of public sales, that it has been properly published and that it would attract purchasers. But, if the specific provision as to proclamation is violated there could be no doubt that the sale cannot be allowed to stand. It cannot be said that the total failure to make the proclamation under O. 21, r. 66 of the Code is a mere irregularity in the publication or conduct of the sale. (*Venkateswara Ethu Naicker v. Ayyamma*, A. I. R. 1950 Mad. 367).

Clause (e) of r. 66 (2) of O. 21 provides that the proclamation shall specify as fairly and accurately as possible "every other thing which the court considers material for a purchaser to know in order to judge of the nature and value of the property." In *Saadatmand Khan v. Phul Kuar*, (1898) 20 All. 412, 418 : 25 I. A. 146, the Judicial Committee held that the value of the property to be put up for sale was an essential fact which the court considers material for a purchaser to know. But the rule nowhere requires that the court should make a valuation. The Calcutta High Court, after a review of contradictory decisions, laid down in *Ban Behari v. Bhukan Lal* (1933) 60 Cal. 581, that it is the duty of the court (apart from exceptional circumstances) to make a valuation, the result of which is to be included in the sale proclamation. This view of the Calcutta High Court is, however, not shared by the Madras, Allahabad, Bombay and Gujarat High Courts who hold that the court is under no obligation to fix in the proclamation of sale its own valuation of the property to be sold. The Orissa High Court has in *Kuntala Bewa v. Sadhu Charan*, I. L. R. (1966) Cut. 350, gone to the length of holding that in every case of under-valuation or misstatement of the value of the property in a sale proclamation there is not material irregularity which by itself would be sufficient to set aside the sale and that the court has no duty to see to the real value. The decree-holder or the judgment-debtor or both are not bound to give any value of the property to be inserted in the sale proclamation. If they give any value, the court would merely insert the same in the sale proclamation with a further declaration that it does not vouch the accuracy of the same. The present rule, as it stands, however, takes away the effect of the decision of the Privy Council in 25 Ind. App. 146 that the value of the property must be inserted as a material fact. The court sales are now thus put

on the same footing as private sales. It hardly makes any difference whether there is non-mention of the valuation or under-valuation of the property in the sale proclamation. The principle of *caveat emptor* has been embodied in the proviso.

The question about the mention or non-mention of the value of the property or whether the court should value the property is now governed by rules framed by several High Courts under S. 122, which empowers them to make rules regulating their own procedure and the procedure of the civil courts subject to their superintendence and which may, by such rules, annul, alter or add to all or of the rules in the First Schedule.

Unless the property ordered to be sold is subject to speedy and natural decay or the expense of keeping it in custody is likely to exceed its value, no sale shall, without the written consent of the judgment debtor, take place before 15 days in the case of immovable property and 7 days in the case of movable property from the date of the proclamation. (O. 21, r. 68).

The sale may be adjourned by the court, but where the sale is adjourned for a longer period than thirty days, a fresh proclamation shall be made, unless the judgment-debtor consents to waive it. (O. 21, r. 69).

The sale shall be stopped if before the lot is knocked down the debt and costs including the costs of the sale are tendered to the officer conducting the sale or paid into the court which ordered the sale. (O. 21, r. 69).

Where a resale has been occasioned by reason of the purchaser's default (*i. e.*, due to his failure to deposit the sale price) any deficiency of price shall be certified to the court by the officer holding the sale and shall be recoverable at the instance of either the decree-holder or the judgment-debtor from the defaulting purchaser. (O. 21, r. 71).

Application of O. 21, r. 71 is limited to cases in which the deficiency of price has occurred by reason of the auction-purchaser's default. The words "Any deficiency of price which may happen on a resale by reason of the purchaser's default occurring in r. 71 therefore mean : "Any deficiency of price which on a resale may happen by reason of the purchaser's default." Property once put to sale in execution proceedings may have to be resold for reasons which may or may not be connected with the default of the auction-purchaser. A re-sale consequent on the failure of the auction-purchaser to deposit 25% of the purchase price immediately after he is declared to be the purchaser of the property under O. XXI, r. 84 or a resale consequent upon his failure to deposit the balance of the purchase price within 15 days of the sale as required by r. 85 are instances when the resale is occasioned by the default of the auction-purchaser. On the other hand, re-sale consequent upon the setting aside of the sale on the ground of material irregularity in publishing or conducting the sale as provided in O. 21, r. 60, may not be attributable to the default of the purchaser. The provisions of O. XXI, r. 71, come into play only if the property is required to be re-sold on account of the default of the auction-purchaser. If the re-sale is not due to the auction-purchaser's default, there can be no question of mulcting him with the deficiency in the price realised in the resale.

What is necessary is that the re-sale occasioned by the auction-purchaser's default must result in a deficiency of price, which deficiency is attributable to his default. Where on resale the market value of the property is reduced

due to the discovery or disclosure of an infirmity in the right, title and interest of the judgment-debtor in the property put to sale, the deficiency of price realised in the re-sale may not be attributable to his default. An encumbrance existing on the property at the time of the first sale but not disclosed in the proclamation of that sale will have no bearing on the price realised in the auction sale, unless the existence of the encumbrance was otherwise known to the bidders. The disclosure of that encumbrance in the sale proclamation accompanying the re-sale must, on normal commercial considerations, have a direct impact on the price of the property put to sale. In such a case the deficiency of price realised in the resale will be attributable not necessarily to the default of the auction-purchaser but to circumstances extraneous to his default. Order XXI, r. 71, concerns itself not with that class of cases but with those in which the deficiency of price realised in the re-sale is attributable to the default of the auction-purchaser. (*Gopal Kishan Das v. Sailendra Nath Biswas*, A. I. R. 1975 Supreme Court, 1290).

The decree-holder shall not, without the express permission of the court, bid for or purchase the property. No officer or person, in any way, concerned in execution of sales shall, either directly or indirectly, bid for or acquire any interest in the property sold. (O. 21, r. 72).

Where a decree-holder purchases the property at the auction sale with the permission of the court, the court may, unless there are other decree-holders entitled to rateable distribution of the assets under S. 73, set off the purchase money and the amount due on the decree against one another and shall enter up satisfaction of the decree in whole or in part. If he purchases without such permission the court may set aside the sale on the application of the judgment-debtor or any other person whose interests are affected by sale, and the decree-holder shall pay all costs and the deficiency of price on resale. It may be noted here that the order setting aside or refusing to set aside is an appealable order. (O. 21, r. 72).

Notwithstanding anything contained in r. 72, a mortgagee of immovable property shall not bid for or purchase property sold in execution of a decree on the mortgage unless the court grants him leave to bid for or purchase the property. [O. 21, r. 72A(1)]. If leave to bid is granted to such mortgagee, then the court shall fix a reserve price as regards the mortgagee, and unless the court otherwise directs, the reserve price shall be—

(a) not less than the amount then due for principal, interest and costs in respect of the mortgage if the property is sold in one lot ; and

(b) in the case of any property sold in lots, not less than such sum as shall appear to the court to be properly attributable to each lot in relation to the amount then due for principal, interest and costs on the mortgage. [O. 21, r. 72A (2)].

Irregularity and Illegality in sale distinguished.—There is a distinction between a case where a property is included in the sale proclamation but in the course of the service of the sale proclamation the provisions of rules 67 to 69 of O. 21 are not fully complied with and certain irregularities are committed, and a case where though the service of sale proclamation is regular in law, but in the sale proclamation so effected any particular property is not included at all.

In the case of the first type the non-compliance with rr. 67 to 69 amounts

in law to an irregularity ; in the case of the second type there is an out and out nullity, for, unless the sale of a property is proclaimed in the sale proclamation, the court has got no jurisdiction to sell it, and if it does sell, the sale is a nullity and void in law. In such a case the regular suit for declaration that the sale was a nullity and void is maintainable in law. (*Tribeni Misir v. Gopal Misra*, A. I. R. 1963 Patna, 60).

SALE OF MOVABLE PROPERTY

Agricultural produce.—In case of agricultural produce the sale shall be held—(a) if such produce is a growing crop, on or near the land on which such crop has grown ; (b) if such produce has been cut or gathered, at or near the threshing-floor or fodder-stack. The court may also direct the sale to be held at the nearest place of public resort.

Where a fair price is not offered, the sale may be postponed till the next day or the next market-day on the application of the owner of the produce. (O. 21, r. 74).

Where the growing crops are capable of being stored, the day of the sale shall be fixed as to admit of its being made ready for storing before the arrival of such day. If the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered and the purchaser shall be entitled to enter on the land for tending and cutting or gathering it. (O. 21, r. 75).

Movable property.—Where movable property is sold by public auction the price of each lot shall be paid at the time of sale or as soon after as the officer holding the sale directs, and in default of payment the property shall forthwith be resold.

When sale becomes absolute in movable property.—On payment of the purchase-money the officer shall grant a receipt for the same, and *the sale shall become absolute*.

In case movable property is a share in goods belonging to a judgment-debtor and a co-owner, the bid of the co-owner shall prevail for such property or for any lot as against a stranger. (O. 21, r. 77).

Irregularity not to vitiate sale.—No irregularity in publishing or conducting the sale of movable property shall vitiate the sale ; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery. (O. 21, r. 78).

Delivery of movable property.—Where the movable property to be sold has been seized, it shall be delivered to the purchaser. Where it is in the possession of some person other than the judgment-debtor, the delivery to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession to any person except the purchaser.

Debts and shares.—Where the property sold is a debt not secured by a negotiable instrument, or is a share in a corporation, the delivery thereof shall be made by a written order of the court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof

to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser. (O. 21, r. 79).

Transfer of negotiable instruments and shares.—Where the execution of document or the endorsement of the party in whose name a negotiable instrument or a share in a corporation is standing is required to transfer, the judge may execute such document or make such endorsement in the following form, namely :—

A. B. by C. D., Judge of the Court of....., in a suit by E. F. against A. B.

Such execution or endorsement shall have the same effect as an execution or endorsement by the party. (O. 21, r. 80).

Vesting order.—In the case of any movable property not hereinbefore provided for, the court may make an order vesting such property in the purchaser or as he may direct. (O. 21, r. 81).

SALE OF IMMOVABLE PROPERTY

Court ordering Sales.—Sale of immovable property in execution of decrees may be ordered by any court other than a court of small causes. (O. 21, r. 82).

Postponement of Sale.—The court may, on the application of the judgment-debtor, postpone the sale of the property to enable him to raise the amount of the decree by mortgage, lease or private sale of the property. (O. 21, r. 83).

Deposit by purchaser and re-sale on default.—On sale of immovable property the purchaser shall pay immediately a deposit of 25 per cent. on the amount of his purchase-money to the officer conducting the sale and the balance into court before the court closes on the 15th day from the sale of the property. In default of payment either of 25 per cent. at the time of sale or the balance by the 15th day from the sale, the property shall be resold and in the latter case the deposit may be forfeited to the Government after defraying the expenses of the sale. (O. 21, rr. 84-86).

Every re-sale of immovable property shall be made after the issue of a fresh proclamation. (O. 21, r. 87).

Where the property sold is a share of undivided immovable property and two or more persons, including a co sharer, bid the same sum for it, the bid of the co-sharer shall prevail. (O. 21, r. 88).

SETTING ASIDE OF SALE

(1) **On Deposit.**—Where immovable property has been sold in execution of a decree, any person claiming an interest in the property sold at the time of the sale or at the time of making the application, or acting for or in the interest of such person, may apply to have the sale set aside on his depositing in court,—

(a) for payment to the purchaser, a sum equal to five per cent. of the purchase-money, and

(b) for payment to the decree-holder, the amount specified in the proclamation of sale for the recovery of which the property was ordered to be sold, less any amount which the decree-holder may have received in payment of the decretal amount. [O. 21, r. 89(1)].

It will be seen from the above that the application to set aside a sale of immovable property under the above rule may be made by—

(a) any person owning the property—he may be the judgment-debtor or some other person whose property has been sold as the property of the judgment-debtor ;

(b) any person holding an interest in property by virtue of a title acquired before the sale—a co-sharer of a mortgagee may be such a person ; so are the mortgagor and the mortgagee.

Where a person applies under r. 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule. [O. 21, r. 89(2)].

Nothing in r. 89 shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale. [O. 21, r. 89, (3)].

The intention of rule 89 of O. 21 is to provide a simple procedure where at the last moment a judgment-debtor may come and deposit without condition the full decretal amount and five per cent. penalty. The making of a deposit is a condition precedent to the making of the application under this rule. The deposit has to be made for payment to the decree-holder the amount specified in the proclamation of sale. Five per cent. deposit has to be paid as compensation to the purchaser in case the sale is set aside. The compensation is provided for the purchaser who suffers the loss on account of the sale being set aside and not confirmed in his favour and indisputably the decree-holder, unless he be also the purchaser, is not entitled to this amount when the sale is set aside. The deposit made under O. 21, r. 89, should be excluded from the ambit of S. 73 of the Code as the rule makes it unequivocally clear that the deposit made must be applied to the two objects enumerated in it and cannot be utilised for any other purpose. [*United Bank of India Ltd. v. Dolga Inda Sahu*, I. L. R. (1966) Cut. 269].

No act of court should harm a litigant and if a person is harmed by a mistake of the court he should be restored to the position he would have occupied but for that mistake, the principle summed up in the maxim *Actus curiae neminem gravabit* for the guidance of the courts.

The judgment-debtors' land was sold in public auction in execution of a usufructuary mortgage decree. He applied under O. 21, r. 89, C. P. C. to set aside the sale on deposit of decretal amount and to let him know the exact amount to be deposited. The office checked and calculated the amount and informed the judgment-debtor who deposited the amount accordingly. It was found later on that 5 per cent. of the purchase price was not calculated by the office and the judgment-debtor had not paid the same. In these circumstances, it was held that the judgment-debtor deserved to be protected from the wrong committed by the Court. (*Ramananda Joykishan v. Md. Abu Hussain*, A. I. R. 1972 Gauhati, 6).

Where the lower appellate Court did not apply the law laid down by the Supreme Court it is an error of jurisdiction on its part. (*Ramananda Joykishan v. Md. Abu Hussain*, A. I. R. 1972 Gauhati, 6).

Where a judgment-debtor does not raise an objection in execution that the court had no jurisdiction to execute the decree, the failure to raise such an objection which goes to the root of the matter, precludes him from raising the plea of jurisdiction on the principle of constructive *res judicata* after the property has been sold to the auction-purchaser. (*Bhola Koeri & another v. Smt. Laxmi Devi*, 1972 A. L. J., p 953).

An application under rule 89 (2), Civil Procedure Code, validly made on the date of its presentation cannot be allowed to be prosecuted until the subsequent application filed under rule 90 is withdrawn. But it cannot be allowed to be made or be deemed to have been made unless the prior application under rule 90 is withdrawn. The words used in Order 21, rule 89(2) are "make or prosecute." If it were to be held that the applicant is not entitled to prosecute his application under rule 89 unless he withdraws his application under rule 90, then the word "make" would become redundant. In order to bring about the true intention of the Legislature, effect must be given to both the words. If a person has first applied under rule 90 to set aside the sale, then unless he withdraws his application he is not entitled to make and prosecute an application under rule 89. The application even if made will be deemed to have been made only on withdrawal of the previous application. If, however, a person has filed an application under rule 89 first and thereafter another application under rule 90, he will not be allowed to prosecute the former unless he withdrew the latter. The applicant has merely to convey to the Court that he is withdrawing his application under rule 90 which he had filed prior to the making of the application under rule 89. Thereupon he becomes entitled to make the latter application. Every applicant has a right to unconditionally withdraw his application and his unilateral act in that behalf is sufficient. No order of the Court is necessary permitting him to withdraw the application. The Court may make a formal order disposing of the application as withdrawn but withdrawal is not dependent on the order of the Court. The act of withdrawal is complete as soon as the applicant intimates the Court that he withdraws the application. (*Shiv Parsad v. Durga Parsad and another*, (1976) I S. C. J., 270]

Limitation.—An application to set aside the sale must be made within 30 days from the date of the sale, *i. e.*, when the property was put up for sale and marked down by the highest bidder.

(2) On ground of irregularity or fraud.—Where any immovable property has been sold in execution of a decree, the decree-holder or the purchaser or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it. [O. 21, r. 90 (1)].

No sale shall be set aside on the ground of irregularity or fraud unless, upon the facts proved, the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud. [O. 21, r. 90 (2)]

No application to set aside a sale under r. 90 shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.

Explanation.—The mere absence of, or defect in, attachment of the property sold shall not by itself, be a ground for setting aside a sale under this rule. [O. 21, r. 90 (3)]

Under Order 21, rule 90, the only persons that may apply for setting aside the sale are :

- (i) the decree-holder ;
- (ii) the purchaser ;
- (iii) any person entitled to share in a rateable distribution of assets under S. 73 ; and

(iv) any person whose interests are affected by the sale. This includes the judgment-debtor, the legal representative of a judgment-debtor and a purchaser from the judgment-debtor *pendente lite*.

An appeal by a stranger auction-purchaser against an order passed on an application for setting aside sale under O. 21, r. 90, and S. 47, C. P. C., is incompetent, as he was not a party to the suit. (*Kali Churan Chatterjee v. Balai Krishna Ghosh*, 83 C. L. J. 197).

The sale under the above rule can be set aside if the following conditions exist :—

- (i) material irregularity or fraud in publishing or conducting the sale ;
- (ii) substantial injury to the applicant ; and
- (iii) such injury must be connected directly with the result of the irregularity or fraud.

Before an application under O. 21, r. 90 can succeed, the applicant must allege in his application that there was a material irregularity or fraud in publishing or conducting the sale. It must also be alleged in the application, not only that there was a material irregularity or fraud in publishing or conducting the sale but also that the applicant has sustained substantial injury and that it is by reason of such irregularity or fraud that such substantial injury has been caused. Where there are no such allegations the application is not maintainable. (*Lakkappa v. Ghimnappa*, A. I. R. 1953 Mys. 48).

It was observed by their Lordships of the Judicial Committee in *B. N. Naidu v. B. V. Naidu*, (1946 A. L. J. R. (I. P. C.)) that mere irregularity or fraud in publishing or conducting the sale will not entitle the court to set it aside unless upon the facts proved the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

Under O. 21, r. 90, C. P. C., an applicant who seeks to set aside a sale should prove that there has been material irregularity or fraud in the publication or conduct of the sale. The mere fact that the property was actually worth much more than what it was sold for, is no ground to set aside the sale. Where the judgment-debtor had notice at every stage of the execution proceedings and the application for reduction of the upset price, but did not choose to oppose any of them, he cannot be heard to say, after the sale is effected, that the price fetched is too low. Where the proclamation of sale was settled and the judgment-debtor did not raise any objection to the description of the property therein, and only wanted time to pay the decretal amount but allows the sale to be proceeded with he cannot at a

later stage be allowed to take advantage of any *bona fide* error in description, to attack the sale. [*Vaidyalingam Pillai v. Chidambaram Pillai*, (1966) I M. L. J. 441].

The rule speaks of irregularity and not illegality, for if the act complained of is illegal the sale is void altogether and no substantial injury need be proved as is necessary in the case of material irregularity.

It may also be noted that where a person applies under Order 21, rule 90 to set aside the sale of his immovable property (on the ground of material irregularity or fraud and substantial injury resulting therefrom), he shall not be allowed to make or prosecute an application under rule 89, unless he withdraws his application under Order 21, r. 90. Where an application under rule 90 is dismissed for default, the applicant is not precluded from applying under this rule. But where the application under rule 90 is pending the judgment-debtor cannot apply under rule 89.

It is only where there is an allegation of material irregularity or fraud in publishing or conducting the sale that O. 21, r. 90, would be applicable.

Material irregularity.—The term ‘irregularity’ in O. 21, r. 90, C. P. C., means ‘not being in conformity with the law or any recognised rule.’ The material irregularity complained of must be one on the part of the court or its officers and it should be shown that there has been disregard of some positive provision of law relating to execution. [*Ukaippaligal Munnai (firm) Madura v. V. Ganesan*, (1966) 2 M. L. J. 90].

Where the sale proclamation mentions only annual net income but not an adequate price, there is a material irregularity. An under-statement of the value of the property in the sale proclamation calculated to mislead bidders is also a material irregularity. An omission to specify in the proclamation of sale the extent of the property to be sold or the revenue assessed thereon, a sale of immovable property held before the expiration of 15 days from the date on which the copy of the proclamation is affixed on the court-house of the Judge ordering the sale and an omission to issue a fresh proclamation, where a sale is adjourned for more than thirty days, are all material irregularities in publishing or conducting the sale and the sale can be set aside if the applicant satisfies the court that he has sustained substantial injury by reason of them.

Order 21, r. 90 (2) will cover omission, deficiencies or formal defects in a sale proclamation, but not fraud in causing of its drawing up or in the furnishing of particulars for its contents. Where there is a fraud the sale must be set aside in spite of the failure of the judgment-debtor to take his objection in time. [*Manmatha Nath Chakravarti v. Sachindra Kumar Chakravarty*, 59 C. W. N. 1082].

A sale held on a holiday is, however, neither an illegality nor an irregularity.

A sale held after the order of postponement had been passed by the executing court, but before the order could be communicated to the selling officer, is a nullity.

Rule 90 of Order 21, C.P.C., permits an application to set aside a sale on the ground of irregularity or fraud. But be it noted that such irregularity or fraud must be in publishing proclamation of or conducting the sale. Any

irregularity or fraud in the settlement of proclamation which precedes its publication or conduct of the sale is not attracted by Rule 90. This is the view taken by the Madras High Court in *Ramalingam v. Sankara Iyer*, A. I. R. 1964 Mad. 424 at p 425. There it was held :

“But, on a closer examination, I am inclined to the view that the words ‘material irregularity or fraud in publishing or conducting it’ cannot be extended to the material irregularity arising out of a breach of the requirements of rule 66. Separate sets of rules are framed under Order XXI, one set relating to settlement of proclamation and the other to the manner of publication of a proclamation of sale. Nevertheless, Rule 90 speaks of material irregularity or fraud in publishing or conducting a sale. The rule, to my mind, will not, therefore, cover any irregularity in the settlement of proclamation.”

In taking that view, the Court followed *Neelu Neithiar v. Subramania Moothan*, (11 Mad. L. W. 50 = A. I. R. 1920 Mad. 481). The same view was expressed in *Kandaswami Mudali v. Narasimha Iyer*, 1951-2 Mad. L. J. 623 = A. I. R. 1952 Mad. 582, decided by a Division Bench. There it was pointed out :

“Anything done antecedent to the order of sale has nothing to do with ‘conducting’ the sale. Again, it is observed by him that the word ‘publishing’ also refers only to what is done antecedent to the actual conduct of the sale but subsequent to the order directing the sale.” (*Rijamnil v. A. T. Krishna-swami*, A. I. R. 1972 Mad. 359).

The Court’s activist obligation to exercise a discretion to make a fair sale out of a court-auction—and avert a distress sale—is under-scored by the provisions contained in Order 21, r. 90, C.P.C. In all public sales the authority must protect the interests of the parties and the rule is stated by the Supreme Court in *Navalkha and Sons v. Ramanya Das*, (A.I.R. 1970 S. C. 2037) thus :

“The principles which should govern confirmation of sales are well established. Where the acceptance of the offer of the commissioners is subject to confirmation of the court the offeror does not by mere acceptance get any vested right in the property so that he may demand automatic confirmation of his offer. The condition of confirmation by the court operates as a safeguard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale. In every case it is the duty of the court to satisfy itself that having regard to the market-value of the property the price offered is not unreasonable. Unless the court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion”.

The expression “material irregularity in the conduct of the sale” must be benignantly construed to cover the climax act of the court accepting the highest bid. Indeed, under the Civil Procedure Code, it is the court which conducts the sale and its duty to apply its mind to the material factors bearing on the reasonableness of the price offered is part of the process of obtaining a proper price in the course of the sale. Therefore, failure to apply its mind to this aspect of the conduct of the sale may amount to material irregu-

larity. Mere substantial injury without material irregularity is not enough even as material irregularity not linked directly to inadequacy of the price is insufficient. And where a court mechanically conducts the sale or routinely signs assent to the sale papers, not bothering to see if the offer is too low and a better price could have been obtained, and in fact the price is substantially inadequate, there is the presence of both the elements of irregularity and injury. But it is not as if the court should go on adjourning the sale till a good price is got, it being a notorious fact that court sales and market prices are distant neighbours. Otherwise, decree-holders can never get the property of the debtor sold. Nor is it right to judge the unfairness of the price by hindsight wisdom. May be, subsequent events, not within the ken of the executing court when holding the sale, may prove that had the sale been adjourned a better price could have been had. What is expected of the judge is not to be a prophet but a pragmatist and merely to make a realistic appraisal of the factors, and, if satisfied that, in the given circumstances, the bid is acceptable, conclude the sale. The court may consider the fair value of the property, the general economic trends, the large sum required to be produced by the bidder, the formation of a syndicate, the futility of postponements and the possibility of litigation, and several other factors dependent on the facts of each case. Once that is done, the matter ends there. No speaking order is called for and no meticulous post-mortem is proper. If the court has fairly, even silently, applied its mind to the relevant considerations before it while accepting the final bid, no probe in retrospect is permissible. Otherwise, a new threat to certainty of court sales will be introduced. [*Kayja Industries (P.) Ltd. v. Asnew Drums (P.) Ltd.* (1974) II S. C. 326].

Applicability of S. 47 and O. 21, r. 90 with regard to an objection by a judgment-debtor against an auction sale.—If a judgment-debtor seeks to set aside the sale on the ground of an irregularity, his application is covered by O. 21, r. 90, C.P.C. but if he seeks a declaration that the sale is null and void, he gets relief under S. 47, C.P.C. A sale attended with an irregularity is quite distinct from a sale that is null and void—the former exists and is in force so long as it is not set aside, whereas the latter does not exist in the eye of law at all. A sale attended with an irregularity has to be set aside ; whereas in a null and void sale only a declaration to that effect may be necessary, if at all. Order 21, r. 90 does not deal at all with a sale that is null and void or with a declaration that it is so. (*Kishan Lal v. Har Prasad*, 1961 A.L.J. 951).

Where an objection contains two parts, one against the very existence of the sale and the other against its legality—there is no reason why it should not be dealt with partly as an objection under S. 47 and partly as an objection under O. 21, r. 90. The part containing the plea that the sale was null and void may be dealt with as an objection under S. 47 and the other part complaining of a material irregularity, may be treated as an objection under O. 21, r. 90, C.P.C. (*ibid*).

Death of one Judgment-debtor.—Where after the death of one of several judgment-debtor under a decree for rent obtained by a co-sharer landlord, execution is taken out and a sale is held without impleading the legal representatives of the deceased judgment-debtor, the sale is void to the extent of the interest of the deceased in the property and his legal representatives are not, therefore, entitled to apply to set aside the sale under O. 21, r. 90, C.P.C., as they are not persons whose interests are affected by the sale

within the meaning of the rule. (*Mrinmayee Ray v. Shreepati Charan Das*, A.I.R. 1946 Pat. 133).

(3) No saleable interest.—The purchaser at any such sale in execution of a decree may apply to the court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold. (O. 21, r. 91). This rule applies only where the judgment-debtor has no interest at all, e. g., when the property sold turns out to be not the property of the judgment-debtor or when the interest was not saleable. It does not apply when the judgment-debtor has no saleable interest in a portion of the property. Even a saleable interest in one of the parcels sold at one time is sufficient.

Besides the above provisions the court has an inherent power to set aside an auction sale if the decree in question has been obtained by fraud or if it appears to have been passed by a court without jurisdiction or if subsequently to the passing of the decree and pending the execution proceeding it has been set aside by a court of appeal.

When sale becomes absolute.—(1) In case of immovable property where no application is made under rule 89, rule 90 or rule 91 or where such application is made and disallowed, the court shall make an order confirming the sale, and thereupon the sale shall become absolute. [(O. 21, r. 92 (1))]:

Provided that, where any property is sold in execution of a decree pending the final disposal of any claim to, or any objection to the attachment of, such property, the court shall not confirm such sale until the final disposal of such claim or objection.

Where such application is made and allowed, and where, in the case of an application under r. 89, the deposit required by that rule is made within thirty days from the date of sale, or in cases where the amount deposited under r. 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the depositor and such deficiency has been made good within such time as may be fixed by the court, the court shall make an order setting aside the sale; provided that no order shall be made unless notice of the application has been given to all persons affected thereby. [O. 21, r. 92 (2)].

No suit to set aside an order made under r. 92 shall be brought by any person against whom such order is made. [O. 21, r. 92 (3)].

Where a third party challenges the judgment-debtor's title by filing a suit against the auction-purchaser, the decree-holder and the judgment-debtor shall be necessary parties to the suit. [O. 21, r. 92 (4)].

If the suit referred to in sub-r. (4) is decreed, the court shall direct the decree-holder to refund the money to the auction-purchaser, and where such an order is passed the execution proceeding in which the sale had been held shall unless the court otherwise directs, be revived at the stage at which the sale was ordered. [O. 21, r. 92 (5)].

A sale cannot be confirmed within 30 days of acceptance of the bid. (*Siddavee Rappa v. Jalal Khan*, I.L.R. 1953 Mys. 570). It is not to be confirmed straightaway without declaring the auction purchaser as the successful bidder under O. 21, r. 84, and without allowing a period of one month for applications under O. 21, rr. 89 to 91, C. P. C.

SALE

65. Purchaser's title.—Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

On the sale becoming absolute the property shall be deemed to have vested in the purchaser from the time of the sale of the property and not from the time when the sale becomes absolute. The decree-holder purchaser becomes owner from the date of sale and not merely from the date of confirmation.

Certificate to purchaser.—Whether a sale of immovable property has become absolute, the court shall grant a certificate specifying the property sold and the name of the declared purchaser. (O. 21, r. 94).

According to S. 65, C.P.C., it is the confirmation of the sale that passes the title and the auction-purchaser becomes the owner of the property from the date of the sale. Under O. 21, r. 94, the vesting of title is not made dependent on the issue of the sale certificate. [*Ram Sri v. Jai Lal*, 1947 A. L. J. 159).

Resistance to delivery of possession to decree-holder or purchaser

Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property he may apply to the court, which shall proceed to adjudicate upon the application in accordance with the provisions herein contained, (O. 21, r. 97); and upon determination of the questions the court shall, in accordance with such determination,—(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or pass such other order as, in the circumstances of the case, it may deem fit. [O. 21, r. 98]. Where upon such determination; the court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, or by any transferee where such transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and, if the applicant is still resisted or obstructed in obtaining possession, the court may also, at his instance, order the judgment-debtor or any person acting at his instigation, to be detained in the civil prison upto 30 days. (S. 74 and O. 21, r. 98). Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the court complaining of such dispossession. The court shall thereupon proceed to adjudicate upon the application in accordance with the provisions herein contained (O. 21, r. 99), provided that the property was not transferred to him by the judgment-debtor after the institution of the suit in which the decree was passed. (O. 21, r. 102).

Order to be passed upon application complaining of dispossession.—Upon

the determination of the questions referred to in rule 101, the Court shall, in accordance with such determination,—

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application ; or

(b) pass such other order as, in the circumstances of the case, it may deem fit. [O. 21, r. 100].

Question to be determined.—All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the court dealing with the application and not by a separate suit and, for this purpose, the court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions. [O. 21, r. 101].

Nothing in rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person. [O. 21, r. 102].

Explanation: In this rule, “transfer” includes a transfer by operation of law.

Where any application has been adjudicated upon under rule 98 or rule 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree. [O. 21, r. 103].

Every order made under rule 101 or rule 103 shall be subject to the result of any suit that may be pending on the date of commencement of the proceeding in which such order is made, if in such suit the party against whom the order under rule 101 or rule 103 is made has sought to establish a right which he claims to the present possession of the property. [O. 21, r. 104].

Hearing of application.—The court, before which an application under any of the foregoing rules of this Order is pending, may fix a day for the hearing of the application. [O. 21, r. 105 (1)].

Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the court may make an order that the application be dismissed. [O. 21, r. 105(2)].

Where the applicant appears and the opposite party to whom the notice has been issued by the court does not appear, the court may hear the application *ex parte* and pass such order as it thinks fit. [O. 21, r. 105 (3)].

Explanation: An application referred to in sub-rule (1) includes a claim or objection made under rule 58.

Setting aside or order passed ex parte, etc.—The applicant, against whom an order is made under sub-rule (2) of rule 105 or the opposite party against whom

an order is passed *ex parte* under sub-rule (3) of that rule or under sub-rule (1) of rule 23, may apply to the court to set aside the order, and if he satisfies the Court that there was sufficient cause for his non-appearance when the application was called on for hearing, the court shall set aside the order on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application. [O. 21, r. 106(1)].

No order shall be made on an application under sub-rule (1) unless notice of the application has been served on the other party. [O. 21, r. 106(2)].

An application under sub-rule (1) shall be made within thirty days from the date of the order, or were, in the case of an *ex parte* order, the notice was not duly served, within thirty days from the date when the applicant had knowledge of the order. [O. 21, r. 106(3)].

Benami Purchase

A purchase by one person in the name of another person is called a *benami* purchase. Where A, under a secret understanding with B, purchases property with his own money, but in B's name, the purchase is said to be *benami*. In such a case B is merely a *benamidar* or ostensible owner.

66. Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff.—(1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims and in any suit by a person claiming title under a purchase so certified, the defendant shall not be allowed to plead that the purchase was made on his behalf or on behalf of someone through whom the defendant claims.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner.

The section provides that no suit shall be maintained against the certified auction-purchaser on the ground that the purchase was made on behalf of the plaintiff unless he can prove that the name of the said purchaser was inserted in the sale certificate fraudulently or without his consent. If A purchases property in B's name at a court sale, and a certificate of sale is issued to B, B will be conclusively deemed to be the real purchaser as against A, and no suit will lie under this section by A against B for possession of the property, unless A can prove that B's name was inserted in the certificate fraudulently or without his consent. The object of the said section is to put a stop to *benami* purchases at execution sales.

The section bars a suit by a person claiming to be the real and beneficial purchaser but not defence, for it only says that no suit shall lie against the certified purchaser on the ground that the purchase was made on behalf of the plaintiff. Thus, if the real purchaser is in possession of the property purchased and the certified purchaser brings a suit against him for possession, the real owner is not debarred from setting up as a defence that the plaintiff was only a *benamidar* for him.

The prohibition under S. 66 should not be extended or widened. That section only applies where a plaintiff claims or asserts a title in himself and challenges the title of the defendant as being merely *benami*; it does not apply to cases where the plaintiff does not claim a title in himself, but admitting the title of the defendant he claims possession under an agreement by which the defendant was bound to transfer the property to him. The fact that such agreement was antecedent to the auction sale cannot bring it within the mischief of S. 66. Nor does S. 66 lay down that every agreement entered into by the judgment-debtor is necessarily bad. (*Nimalchand Gulabsa v. Madanlal Jagannath*, I. L. R. 1952 Bom. 40).

Where the plaintiff claims title to property on the ground that the auction purchase was made by the defendant on behalf of the plaintiff, that the sale price was wholly furnished by the plaintiff and that there was no intention of conferring any title on the defendant, S. 66 (1) C. P. C., will be a bar to the suit, though framed as one for specific performance of an agreement to convey. The test is this: If the plaintiff's title depends ultimately on the *benami* nature of the transaction, then S. 66 would be a bar; but if the plaintiff's title is dependent upon other facts like, *e. g.*, the application of the general law or the carrying out of a separate contract, then S. 66 would be no bar. [*Suryanarayana v. Venkata Subba Rao*, (1951) 2 M.L.J. 76].

Transactions which are called *benami* are lawful and are not prohibited. But S. 66 (1) seeks to oust the jurisdiction of the court to give effect to real as against *benami* title. The object of the clause is to prevent claims before the civil court that the certified purchaser purchased the property *benami* for another person. Thereby jurisdiction of the civil court to give effect to the real as against the nominal title is restricted and the section must be strictly construed. But where the claim is that the properties belonged to the joint family because they were purchased with the aid of joint family funds in the name of the *benamidar* such a claim does not fall within the terms of S. 66 (1). (*Girijanan Devi v. Bijendra Narain Choudhary*, 1967 All. L. J. 478).

Private Sales.—At private sales the law is that he who pays the purchase money is the real purchaser. There is no law in India to prevent such *benami* transaction in private sales, unless it be in fraud of creditors and the object of the fraud is carried out. In fact, the practice of purchasing property *benami* is very common in our country. Thus where A, under a secret understanding with B, purchases property, with his own money, in B's name, B holds the property in trust for A and A may compel B to transfer the property to him (A). If, however, A's object in purchasing the property in B's name was to defraud his creditors and the object of the fraud is carried out, the court will not help A in recovering possession of the property from B. But if the object of the fraud is not carried out, the court will help A in recovering possession of the property from B, notwithstanding A's primary intention to effect a fraud.

It follows from a review of case-law on S. 66 that (i) S. 66 must be construed strictly as it encroaches upon the rights of the true owner remembering that *benami* transactions are only being discouraged by the legislature but are not being made illegal ; (ii) where a true owner recovers possession or has always been in possession and he bases his relief in the suit (other than that of possession or confirmation of possession) upon a title obtained by the purchase, the provisions of S. 66 have no application ; (iii) the real owner, if he is in possession, can always resist a suit by the certificated auction-purchaser as a plaintiff ; (iv) the real owner is entitled to maintain a suit for specific performance of an agreement by the ostensible owner to transfer the property to him provided such an agreement is made after the auction purchase ; (v) where the true owner has dispossessed the certificate-holder and is adversely in possession for over 12 years, he can maintain a suit for recovery of possession even against the certificated purchaser because his claim is now based upon a different title and it is immaterial for him to allege or prove that he was the real owner at the date of the auction sale. (*Sheoshankar Prasad v. Mahabir Prasad*, 26 Pat. 505).

67. Power for State Government to make rules as to sales of land in execution of decrees for payment of money.

—(1) The State Government may, by notification in the official Gazette, make rules for any local area imposing conditions in respect of the sale of any class of interests in land in execution of decrees for the payment of money, where such interests are so uncertain or undetermined as, in the opinion of the State Government, to make it impossible to fix their value.

(2) When on the date on which this Code came into operation in any local area, any special rules as to sale of land in execution of decrees were in force therein, the State Government may, by notification in the Official Gazette, declare such rules to be in force, or may, by a like notification, modify the same.

Every notification issued in the exercise of the powers conferred by this sub-section shall set out the rules so continued or modified.

Delegation to Collector of power to execute decrees against Immovable Property

Sections 68 to 72 of the Code which provided that the State Government might under certain circumstances transfer in any local area the execution of decrees ordering sale of immovable property to the Collector have been omitted by Act 66 of 1956. Section 16 of the Code of Civil Procedure (Amendment) Act, 1956, (Ac 56 of 1956), however, lays down that where, before the commencement of the Act, the execution of a decree has been transferred to the Collector under S. 68 of the principal Act and is pending before the Collector on such commencement, then notwithstanding the omission of Ss. 68 to 72 inclusive and the Third Schedule to the principal Act the decree shall be executed by the Collector in accordance with the provisions of the said sections and the said Schedule as if this Act had not been passed.

DISTRIBUTION OF ASSETS

The object of S. 73, which provides for the distribution of proceeds of execution sale rateably among the decree-holders, is to provide an expeditious summary and cheap remedy for the execution of money decrees held against the same judgment-debtor by adjusting the claims of rival decree-holders without the necessity for separate proceedings. On the one hand, it prevents unnecessary multiplicity of execution proceedings and, on the other, it secures an equitable administration of the property by placing all the decree-holders upon the same footing and making all the property rateably divisible among them.

73. Proceeds of execution sale to be rateably distributed among decree-holders.—(1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons :

Provided as follows :

(a) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale ;

(b) where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold ;

(c) where any immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

first, in defraying the expenses of the sale ;

secondly, in discharging the amount due under the decree ;

thirdly, in discharging the interest and principal monies due on subsequent incumbrances (if any) ; and

fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably dis-

tributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

(3) Nothing in this section affects any right of the Government.

Essential Conditions.—From a reading of the section it is manifest that the following conditions must be present to entitle a decree-holder to participate in the assets of a judgment-debtor :

(1) The applicant for rateable distribution must have obtained his decree ; and the decree-holder claiming to share in the rateable distribution should have applied for execution to the court which holds the assets ;

(2) Such application for execution of the decree should have been made prior to, and must be subsisting and pending one at the time of, the receipt of the assets by the court, *i. e.*, before the assets are realised ;

(3) The assets of which rateable distribution is claimed must be assets held by the court ;

(4) The attaching creditor as well as the decree-holders claiming to participate in the assets should be holders of decrees for the payment of money, *i. e.*, money decrees ; and

(5) Such decrees should have been obtained against the same judgment-debtor.

The essential conditions for the application of S. 73 are : (1) the assets must be held by the court ; (2) the decrees obtained by the decree-holders and the attaching creditor must be decrees for payment of money ; (3) such decrees should have been obtained against the same judgment-debtor ; (4) the creditor claiming rateable distribution must have applied for execution to the Court by which the assets are held ; and (5) such an application must have been made before the assets are received by the court. (*Bharat Paint Mart v. Bhagwati Devi*, 1961 A. L. J., p. 963).

Where a creditor merely gets an attachment before judgment, he is not entitled to claim rateable distribution of assets realised in execution before he took out execution proceedings. Attachment of property after judgment is also not sufficient to share in the rateable distribution but a formal application is necessary before the assets come into the court's possession.

Section 73 does not require that an application for rateable distribution as distinct from an application for execution should be filed before assets were received. What is necessary is that the application for execution must be filed before the receipt of assets. Though execution proceedings do not abate, a court cannot proceed with the execution of a decree when the judgment-debtor against whom execution was sought is dead and representatives have been brought on record. Therefore, where on the date the assets were received by the court the representatives have not been substituted, there is no valid or subsisting application for execution so as to entitle the decree-holder to get rateable distribution. (*Rajalakshmi Dassi v. Province of W. Bengal*, A. I. R. 1955 Cal. 573).

Same judgment-debtor.—It has been held that where the holder of a decree against two or more persons applies for rateable distribution of the assets realized from the property belonging to one of such persons, the application is one for execution of the decree against the same judgment-debtor. A decree against a partner and a decree against him in his individual capacity are decrees against the same judgment-debtor, but a decree against a firm and a decree against a partner of the firm in his individual capacity are not against the same judgment-debtor. A decree against a Hindu father on a promissory note executed by the father alone and a decree against the father and his son are not decrees against the same judgment-debtor. But where the property from which the assets are realised by the sale is the property of the joint family the decrees against the father and against the father and son can be said to be against the same judgment-debtor. If a decree is obtained against a man as heir of a deceased person and another decree is obtained against him in his personal capacity, the two decrees are against the same judgment-debtor. A decree against a person and a decree against his legal representative are not decrees against the "same judgment-debtor" for purposes of S. 73, C. P. C. 'Judgment-debtor' in the section means the same person in law and fact. It does not include legal representative. (*Gianchand Lakhimal v. Purumal Chellaram*, I. L. R. 1943 Kar. 426).

Receipt of assets.—It has been held that salary of a Government servant when attached, money deposited by a surety for release of an attachment before judgment, money paid into court by the judgment-debtor and deposit by a defaulting purchaser are assets liable to rateable distribution; but the moneys paid privately by the judgment-debtor to the decree-holder are not paid into court and money paid for a specific purpose are not assets liable to rateable distribution.

Application.—Section 73 does not require the making of a formal application for a rateable share in the assets, but an application to the court for execution of his decree for payment of money is enough. There is no limitation prescribed for such an application, but it should at any rate be made before the receipt of assets.

Appeal.—An order made under S. 73 is not appealable unless all the conditions mentioned in S. 47 are present, one of them being that the question decided by the court should be one which arose between the parties to the suit, *i. e.*, between the judgment-debtor on the one hand and the decree-holder on the other. Hence an order refusing rateable distribution between two rival decree-holders not affecting the interest of the judgment-debtor is an order in execution proceedings and not a decree and no second appeal lies from such order.

RESISTANCE TO EXECUTION

74. Resistance to execution.—Where the Court is satisfied that the holder of a decree for the possession of immovable property or that the purchaser of immovable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property.

PART III

INCIDENTAL PROCEEDINGS

[Sections 75-78 and Orders XXII to XXVI]

COMMISSIONS

[Sections 75-78 and Order XXVI]

75. Power of Court to issue commissions.—Subject to such conditions and limitations as may be prescribed, the Court may issue a commission—

- (a) to examine any person ;
- (b) to make a local investigation ;
- (c) to examine or adjust accounts ;
- (d) to make a partition ;
- (e) to hold a scientific, technical, or expert investigation ;
- (f) to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit ; or
- (g) to perform any ministerial act.

Examination.—Any court may in a suit issue a commission either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit, or of the witness to be examined, for the examination on interrogatories or otherwise of (1) any person resident within its jurisdiction who is from sickness or infirmity unable to attend it ; provided that a commission for examination on interrogatories shall not be issued unless the court, for reasons to be recorded, thinks, it necessary so to do, and the court may accept a certificate of a registered medical practitioner as evidence of the sickness or infirmity of any person ; (2) any person entitled to exemption from personal appearance in court, as provided in S. 133 of the Code, viz., the President and Vice-President of India, the Speaker or Chairman of the House of the People, Assembly or Council, the Ministers and the Judges of High Court and Supreme Court ; (3) any woman, who, according to the customs and manners of the country, ought not to be compelled to appear in public ; (4) any person who is about to leave the local limits of its jurisdiction before the date on which he is required to be examined in court ; (5) any person resident beyond the local limits of its jurisdiction ; and (6) any person in the service of the Government, who cannot, in the opinion of the court, attend without detriment to the public service ; provided that in cases (4) to (6) where, under r. 19 of O. XVI (which lays down that no witness be ordered to attend in

person unless resident within certain limits), a person cannot be ordered to attend a court in person, a commission shall be issued for his examination if his evidence is considered necessary in the interests, of justice and provided further that a commission for examination of such person on interrogatories shall not be issued unless the court, for reasons to be recorded, thinks it necessary so to do. (O. 26, rr. 1 and 4).

Examination of witnesses on commission is in the discretion of the court. It should examine witnesses on commission only for adequate reasons, which are broadly mentioned above.

76. Commission to another Court.—(1) A commission for the examination of any person may be issued to any Court (not being a High Court) situate in a State other than the State in which Court of issue is situate and having jurisdiction in the place in which the person to be examined resides.

(2) Every Court receiving a commission for the examination of any person under sub-section (1) shall examine him or cause him to be examined pursuant thereto, and the commission, when it has been duly executed, shall be returned together with the evidence taken under it to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order.

A commission for the examination of any person may be issued to any Court (not being a High Court) situate in a State other than the State in which the Court of issue is situate. Where evidence of a person residing outside India is necessary, the court may issue either a commission or a letter of request. (S. 76 and O. 26, r. 5). Every court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto and return the commission together with the evidence, which shall, subject to the provisions of r. 8, form part of the record of the suit. (O. 26, r. 7).

Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless (a) the person who gave the evidence is beyond the jurisdiction of the court, or dead, or unable, from sickness or infirmity, to attend, or exempted from personal appearance in court, or is a person in the service of the Government who cannot attend without detriment to the public service, or (b) the court authorises the evidence to be read as evidence in the suit. (O. 26, r. 8).

Investigations.—A commission to make local investigation may be issued for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits. (O. 26, r. 9).

The judicial function of a court cannot, however, be delegated to a commissioner.

The commissioner should return his report after making an inspection along with the evidence, if any, recorded by him to the court.

Such report and the evidence taken by him shall be evidence in the suit and shall form part of the record, but the court or the parties, with the permission of the court, may also examine the commissioner in court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

A further inquiry may be directed by the court where for any reason it is dissatisfied with the proceedings of the commissioner. (O. 26, r. 10).

Rule 10 of O. 26 does not make the report of the commissioner as concluding the question of valuation. On the contrary the rule gives clear indication that the report of the Commissioner is only one of the pieces of evidence amongst other evidence to be led by the parties for determination of the issue on valuation of the suit. (*Harihar Misra v. Narhari Setti*, A. I. R. 1966 Orissa, 121).

Commissions for scientific investigation, performance of ministerial act and sale of movable property.—Under the provisions of rules 10-A to 10-C of O. 26, inserted by the Amendment Act, 1976, where any question arising in a suit involves any scientific investigation, the performance of a ministerial act or the sale of movable property in the custody of the court, which cannot, in the opinion of the court, be conveniently conducted, or performed before the court or in the case of movable property preserved, the court may, if it thinks it necessary or expedient in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question, to perform the ministerial act or conduct such sale and report thereon to the court.

The provisions of r. 10 of O. 26 shall apply in relation to a commissioner appointed under this rule as they apply in relation to a commissioner appointed under r. 9.

Accounts.—The court may issue a commission to such person as it thinks fit in a suit in which an examination or adjustment of accounts is necessary. The proceedings and report of the commissioner shall be evidence in the suit unless the court directs further inquiry. (O. 26, rr. 11 and 12).

Partition.—Where a preliminary decree for partition of immovable property has been passed, the court may issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree, except in undivided estates assessed to the payment of revenue where the partition is made by the Collector under S. 54 of the Code. (O. 26, r. 13).

Where in a suit for partition of joint family property, the trial court appoints a commissioner directing him to submit his proposals for partition of the property, and for that purpose authorises him to ascertain the property which was available for partition and to ascertain the liability of the joint family and for deciding those questions, the commissioner was empowered to record statements of the parties, frame issues and to record evidence as might be necessary, the court does not, by so authorising the commissioner, abdicate its functions to the commissioner. The commissioner was merely called upon to make proposals for partition on which the parties would be heard, and the court would adjudicate upon such proposals in the light of the preliminary decree and the contentions of the parties. The proposals of the commissioner cannot from their very nature be binding upon the parties nor the reasons in support thereof. (*Munnalal v. Rajkumar*, A. I. R. 1962 S. C. 1493).

Procedure of Commissioner.—The commissioner shall after inquiry divide the property into shares, shall allot such shares to the parties and award sums to be paid for the purpose of equalising the value of the shares in terms of the order under which the commission was issued. The commissioner shall then prepare and sign a report and transmit it to the court, which shall after hearing any objections to the report confirm, vary or set aside the same. (O. 26, r. 14).

Expenses of the Commission.—Before the issue of a commission the court may order for deposit of a sum into court to cover expenses of the commissioner by the party at whose instance or for whose benefit the commission is issued.

Powers of Commissioner.—He may (a) examine the parties and witnesses ; (b) call for and examine documents ; and (c) at any reasonable time enter upon or into any land or building mentioned in the order. (O. 26, r. 16).

Questions objected to before the commissioner.—Where any question put to a witness is objected to by a party or his pleader in proceedings before a commissioner appointed under O. XXVI, the commissioner shall take down the question, the answer, the objections and the name of the party or, as the case may be, the pleader so objecting : Provided that the commissioner shall not take down the answer to a question which is objected to on the ground of privilege but may continue with the examination of the witness leaving the party to get the question of privilege decided by the court, and, where the court decides that there is no question of privilege, the witness may be recalled by the commissioner and examined by him or the witness may be examined by the court with regard to the question which was objected to on the ground of privilege. (O. 26, r. 16-A(1)). No answer taken down under sub-r. (1) shall be read as evidence in the suit except by the order of the court. [O. 26, r. 16A(2)].

The provisions of the Code governing attendance and examination of witnesses shall also apply to persons required to give evidence or to produce documents before the commissioner. When the commissioner is not a judge of a civil court, he shall not be competent to impose penalties ; but such penalties may be imposed on the application of such commissioner by the court by which the commission was issued. (O. 21, r. 17). Where the parties do not appear before the commissioner, he may proceed *ex parte*. (O. 21, r. 18).

The court issuing a commission shall fix a date on or before which the commission shall be returned to it after execution, and the date so fixed shall not be extended except where the court, for reasons to be recorded, is satisfied that there is sufficient cause for extending the date. (O. 26, r. 18-B).

The provisions of O. 26 shall apply, so far as may be, to proceedings in execution of a decree or order. (O. 26, r. 18-A).

Commission by High Court.—If a High Court is satisfied (a) that a foreign court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it, (b) that the proceeding is of a civil nature, and (c) that the witness is residing within the limits of the High Court's appellate jurisdiction, it may issue a commission, upon application by a party to the proceeding before the foreign court, or upon an application by a law officer

of the State Government, for the examination of such witness. The commission will be issued to any court within whose jurisdiction the witness resides or to any person deemed fit to execute it where the witness resides within the local limits of the original civil jurisdiction of the High Court. After the commission has been executed it shall be returned together with the evidence to the High Court, which shall forward it to the Central Government along with the letter of request for transmission to the foreign court. (O. 26, rr. 19-22).

77. Letter of request.—In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within India.

78. Commissions issued by foreign Courts.—Subject to such conditions and limitations as may be prescribed, the provisions as to the execution and return of commissions for the examination of witnesses shall apply to commissions issued by or at the instance of—

(a) Courts situate in any part of India to which the provisions of this Code do not extend ; or

(b) Courts established or continued by the authority of the Central Government outside India ; or

(c) Courts of any State or country outside India.

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES

[Order XXII]

Abatement in General

Abatement implies a suspension or termination of proceedings in an action for want of proper parties or owing to a defect in the writ or service.

Formerly almost every change of interest after the commencement and before the termination of proceedings caused an abatement or termination. But now a cause or matter shall not be abated by the marriage, death or bankruptcy of any of the parties, if the cause of action survives, nor shall it abate by changes in title during the pendency of the suit.

In India abatement of proceedings is governed by Order XXII of the Code of Civil Procedure. Rule 1 provides that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. “Right to sue” means the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death. The cause of action in the original and revived suits must be the same and no fresh cause of action can be imported into the revived suit.

As to cases in which the right to sue survives, the relevant provisions are to be found in S. 37 of the Indian Contract Act and S. 305 of the Indian Succession Act. Section 37 of the Contract Act provides that “promises bind the legal representatives of the promisor in case of the death of such promisor

before performance unless a contrary intention appears from the contract." Such a contrary intention appears in contracts involving the exercise of special skill or involving personal confidence. Section 306 of the Succession Act, in effect, provides that the right to sue does not survive in suits for defamation, assault or other personal injuries not causing the death of the party; and also in cases where after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory. The result is that the right to sue survives in such actions as suits for damages for breach of contract, suits for recovery of property, suits for recovery of debt, etc. The right to sue does not survive in suits to recover damages for breach of contract of marriage, death of father during pendency of suit for damages for seduction of daughter, etc. Death of the applicant for leave to sue in *forma pauperis* also causes abatement.

A personal cause of action, such as the personal requirement of the premises by the landlord must perish with the death of the plaintiff and his legal representative cannot continue the proceedings on his death. If the legal representatives were permitted to continue the proceedings, the *lis* will assume a complexion wholly beyond the compass of the original cause of action. Indeed, it is difficult to see how, without a fundamental alteration of the pleadings, the proceedings could be continued. Such an alteration will fall beyond the scope of amendment of pleadings permissible under a most liberal interpretation of O. 6, r. 17, C. P. C. : *Smt. Phool Rani v. Naubat Rai Ahluwalia*, C.A. No. 1879 of 1971, dated 14th March, 1973, (1973) 1 S. C. J., 25, Notes).

Rule 6 of Order XXII provides that whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, and the judgment may be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.

Procedure.—Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants. (O. 22, r. 2).

Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. Where within the time limited by law (*i. e.*, within 90 days of the death) no application is made the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff. (O. 22, r. 3).

Where a plaintiff, who had filed a suit for partition against his sons, dies, the right to sue survives to his widow and she can be added as the legal representative of the deceased plaintiff. [*Subbarami Reddi v. Sankaramma*, A. I. R. 1951 Mad. 654.]

Right to future maintenance does not survive on the death of the plaintiff. [*Vaduvambal Ammal v. Varadarajulu Chetty*, 68 L. W. Jr. 24].

Death of one of several defendants or of sole defendant.—Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the court on an application made in that behalf shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. Where within the time limited by law (*i. e.*, within 90 days of the death) no application is made the suit shall abate as against the deceased defendant. (O. 22, r. 4).

The court, whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and the judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place. [O. 22, r. 4 (4)].

Where—(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under r. 4 of O. 22 within the period specified in the Limitation Act, 1963, and the suit has, in consequence, abated, and (b) the plaintiff applies after the expiry of the period of limitation, for setting aside the abatement and also for the admission of that application under S. 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved. [O. 22, r. 4 (5)].

If, in any suit, it shall appear to the court that any party who has died during the pendency of the suit has no legal representative, the court may, on the application of any party to the suit, proceed in the absence of a person representing the estate of the deceased person, or may by order appoint the Administrator-General, or an officer of the court or such other person as it thinks fit to represent the estate of the deceased person for the purpose of the suit; and any judgment or order subsequently given or made in the suit shall bind the estate of the deceased person to the same extent as he would have been bound if a personal representative of the deceased person had been a party to the suit. [O. 22, r. 4A (1)]. Before making an order under this rule, the court (a) may require notice of the application for the order to be given to such (if any) of the persons having an interest in the estate of the deceased person as it thinks fit; and (b) shall ascertain that the person proposed to be appointed to represent the estate of the deceased person is willing to be so appointed and has no interest adverse to that of the deceased person. [O. 22, r. 4 A(2)].

Where in a proceeding, a party dies and one of the legal representatives is already on the record in another capacity, it is only necessary that he should be described by an appropriate application made in that behalf that he is also on the record as an heir and legal representative. Even if there are other heirs and legal representatives and no application for impleading them is made within the prescribed period of limitation, the proceeding will not abate on that account.

Abatement of the appeal.—No order of the Court is necessary for effecting abatement of the appeal. (*Churva v. Baneshwar*, A. I. R. 1926 All. 217, F. B.). When an appeal abates the memorandum of appeal is placed before the Court. The memorandum of appeal constitutes a proceeding pending in the Court and it is necessary for the Court to finally dispose of that proceeding. When it records the order that the appeal has abated what it does in fact is to make an order disposing of the proceeding. An appeal must not be confused with the memorandum of appeal. An appeal is a remedy while the memorandum of appeal is a proceeding giving effect to that remedy. When the appeal abates, the remedy is extinguished. But the proceeding which has been instituted for the purpose of giving expression to that remedy has yet to be disposed of. Its disposal, in the circumstances, may be mere formality, but nonetheless a necessary and proper formality. (*Ved Prakash v. Duli Chand*, 1971 A. L. J. 1233).

Effect of abatement.—Where a suit abates or is dismissed under Order XXII, no fresh suit can be brought on the same cause of action. The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal: and if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit. (O. 22, r. 9)

Under the provisions of the Code abatement comes into effect automatically on the expiry of the period prescribed, from the date of death of the deceased party. No specific order by any court is required to bring into effect an abatement and, therefore, no appeal is provided against an order recording the fact that the suit has abated. The Code, however provides for an application for setting aside the abatement. An order refusing to set aside an abatement or granting an application for setting aside the abatement has been made appealable. (*Hubiba Rahman v. Pooran*, A. I. R. 1966 All. 353, F. B.).

An application to set aside an abatement must be made within sixty days from the date of the abatement. The court can, however, condone the delay in filing an application under S. 5 of the Indian Limitation Act. (O. 22, r. 9).

Nothing in r. 9 shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed under O. 22.

Effect of Abatement of appeal as against co-respondent.—When O. 22, r. 4, C. P. C. does not provide for the abatement of the appeals against the co-respondents of the deceased respondent there can be no question of abatement of the appeals against them. The only question is whether the appeal can proceed against them. The provisions of O. 1, r. 9, C. P. C. also show that if the court can deal with the matter in controversy so far as regards the rights and interests of the appellant and the respondents other than the deceased respondent it has to proceed with the appeal and decide it. It is only when it is not possible for the court to deal with such matters, that it will have to refuse to proceed further with the appeal and, therefore, dismiss it. The heirs of the deceased defendant who are no party to the suit, will not be bound by the decree and in that sense the decree will not be effective against the heirs. But that does not mean that no effective decree

can be passed against other defendants. If an effective decree can be passed against other defendants, the whole suit cannot abate.

The question whether a court can deal with such matters or not, will depend on the facts of each case and, therefore, no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the court. The test to determine this has been described in diverse forms. Court will not proceed with an appeal (a) when the success of the appeal may lead to the court's coming to a decision which will be in conflict with the decision between the appellant and the deceased respondent and therefore, which would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary reliefs against those respondents alone who are still before the court and (c) when the decree against the surviving respondents, if the appeal succeeds, will be ineffective, that is to say it could not be successfully executed. (*State of Punjab v. Nathu Ram*, A. I. R. 1962 Supreme Court 89; *Bholanath Thakur v. Sarvananda Kotoky*, A. I. R. 1966 Assam, 41).

Duty of Pleader to communicate to court death of a party. - Whenever a pleader appearing for a party to the suit comes to know of the death of the party, he shall inform the court about it party shall be in form 5 to subject...to A and the court shall thereupon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist. (O. 22, r. 10 A)

Insolvency of the plaintiff. - The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors shall not cause the suit to abate unless such assignee or receiver declines to continue the suit or unless for any special reason the court otherwise directs to give security for the costs thereof within such time as the court may direct.

Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate. (O. 22, r. 8).

Marriage.—The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone.

Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree. O. 22, r. 7).

Decree in relation to dead person.—A decree passed in favour of a person who was dead at the date of the institution of the suit is a nullity. Similarly, a decree passed against a defendant, who died pending the suit without bringing his legal representative on the record, is a nullity and cannot be executed against the legal representative. A decree passed against a respondent in ignorance of the fact of his death is also a nullity.

Execution Proceedings.—The rules relating to the death of a party pending the suit do not apply to proceedings in execution.

Assignment before final order in the suit.—In case of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved. (O. 22, r. 10).

WITHDRAWAL AND ADJUSTMENT OF SUITS

(Order XXIII)

Withdrawal of suit or abandonment of part of claim.—At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim. [O. 23, r. 1 (1)].

The plaintiff who has already moved an application under O. 23, r. 1 (1) cannot withdraw the application for withdrawal of the suit, even before the orders are passed on the withdrawal application, *i. e.*, that the suit is, as far as the plaintiff is concerned struck off from the file. This is on the assumption that there is withdrawal in fact as well as in law. The question would not arise if there is withdrawal of suit in fact but not in law, for example, when the plaintiff says that the withdrawal was vitiated by the fraud practised on him by any opposite party, in which case there is no withdrawal in law. The right to withdraw the suit is not fettered by any conditions. It is an absolute right which a plaintiff can exercise at his sweet will at any time before the judgment is delivered. Since withdrawing a suit is a unilateral act to be done by the plaintiff, it requires no permission or order of the court and is not subject to any condition; it becomes effective as soon as it is done just as a compromise does.

On withdrawal certain orders may be passed by the court but they are not for giving effect to the withdrawal, but to give effect to consequences arising out of the withdrawal. Order 23, r. 1 (1) does not require any order.

The right to withdraw has been expressly conferred by r. 1 (1); there is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke the withdrawal. (*Raisa Sultana Begam v. Qudir*, A I. R. 1966 All. 318):

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rr. 1 to 14 of O. XXXII (suits by or against minors) extend, neither the suit nor any part of the claim shall be abandoned without the leave of the court. [Proviso to r. 1 (1), O. 23].

An application for leave under the proviso to sub-r. (1) shall be accompanied by any affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect

that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person. [O. 23, r. 1 (2)].

Where the court is satisfied—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim. [O. 23, r. 1 (3)].

The Court allows permission to withdraw the suit on being satisfied (a) that the suit must fail by reason of some formal defect, *i. e.*, misjoinder of parties or causes of action or improper valuation and insufficiency of court-fee or (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter or a suit of part of a claim. The grounds in clause (b) must be analogous to the grounds in (a).

The court has no jurisdiction to allow withdrawal of suits with liberty to institute a fresh suit unless any of the conditions in clauses (a) and (b) is satisfied. [O. 23, r. 1 (3)].

Where the plaintiff abandons any suit or part of claim under sub-r. (1) or withdraws from a suit or part of a claim without the permission referred to in sub-r. (3), he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. [O. 23, r. 1 (4)].

Nothing in this rule shall be deemed to authorise the court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-r. (1), or to withdraw, under sub-r. (3), any suit or part of a claim, without the consent of the other plaintiffs. [O. 23, r. 1 (5)].

Where a suit is withdrawn or abandoned by a plaintiff under r. 1, and a defendant applies to be transposed as a plaintiff under r. 10 of O. 1, the court shall, in considering such application, have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants. (O. 23, r. 1-A).

Meaning and Scope of "subject-matter."—Rule 1 (3) of O. 23, Code of Civil Procedure, empowers the courts to permit a plaintiff to withdraw from the suit brought by him with liberty to institute a fresh suit in respect of the subject-matter of that suit on such terms as it thinks fit. The expression 'subject-matter' is not defined in the Civil Procedure Code. It does not mean property. That expression has a reference to right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit is the same as that in the first suit, it cannot be said that the subject-matter of the second suit is the same as that in the previous suit.

Mere identity of some of the issues in the two suits does not bring about an identity of the subject-matter in the two suits. As observed in *Rakhma Bav. Mahadeo Narayan* [(1918) 1 L. R. 42 Bom. 155] the expression "subject-matter" in O. 23, r. 1, C. P. C., means the series of acts or transactions alleged

to exist giving rise to the relief claimed. In other words, "subject-matter" means the bundle of facts which have to be proved in order to entitle the plaintiff to the relief claimed by him. Their Lordships of the Supreme Court accepted as correct the observations of Wallis, C. J., in *Singa Reddi v. Subba Reddi* [(1916) I.L.R. 39 Mad. 987] that where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit. (*Vallabhdas v. Madanlal Premsukh* (1971) 1 S. C. J. 728).

Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission of the court he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. [O. 23, r. 1 (4)].

Sub-rule (1) of R. 1 of Order 23, C. P. C. confers an unqualified right on the plaintiff to withdraw the suit at any time. Since an appeal is continuation of the suit, the right of the plaintiff to withdraw from the suit inheres even at the appellate stage. The Supreme Court in the case of *Hulas Rai v. K. B. Bass & Co.*, A. I. R. 1968 S. C., 111, observed as follows :

"The language of O. 23, r. 1, sub-rule (1), C. P. C. gives an unqualified right to a plaintiff to withdraw from a suit and if no permission to file a fresh suit is sought under sub-r. (3) of that rule, the plaintiff becomes liable for such costs as the court may award and becomes precluded from instituting any fresh suit in respect of that subject-matter under sub-r. (4) of that rule. There is no provision in the Code of Civil Procedure which requires the court to refuse permission to withdraw the suit in such circumstances and to compel the plaintiff to proceed with it."

The above quoted observation of the Supreme Court rendered the view taken by a single Judge of the High Court at Allahabad in the case of *Kedarnath v. Chand Kiran*, (A. I. R. 1962 All. 263) nugatory. When the plaintiff withdraws from his suit without seeking permission, contemplated under sub-rule (2), he is precluded from instituting any fresh suit in respect of the subject-matter or the claim made in the suit so withdrawn. In this context of the law it is difficult to appreciate the argument that any vested right of the defendant under the decree of dismissal of the suit by the trial court, is being taken away or being put in jeopardy. In law, the defendant gets absolute protection as the plaintiff will not be able to file a fresh suit relating to the same subject-matter or the same claim. (*Kamta v. Gaya Prasad*, A. I. R. 1972 Allahabad, 143).

A contrary view was, however, taken in a subsequent case by a single Judge of the same High Court, viz., in *Kanhaiya v. Mst. Dhaneshwari*, (1972 A. L. J. 575) and it was held that a plaintiff-appellant has no right under O. XXIII, r. 1 (1), C. P. C. to withdraw a suit when rights have accrued to the respondents under the decree. This view found support from the observation of the Supreme Court in the case of *Inanati Mallappa Basappa v. Desai Basavaraj Avvappa* (A. I. R. 1958 S. C. 698). Dealing with the question of the right of the petitioner to withdraw or abandon a part of his claim once an election petition is presented to the Election Commissioner, the Supreme Court laid down that there was no power in the Election Commission to allow a petitioner to withdraw or abandon a part of his claim either by having resort to the provisions of O. XXIII, r. 1, C. P. C. or otherwise as such a withdrawal or abandonment would have the effect of depriving the returned candidate

or any other party of the right of recrimination which had accrued to him under the Act.

In *Kedar Nath v. Chandra Kiran* (A. I. R. 1952 Allahabad, 263), it was held that O. XXIII, r. 1 (1) does not give an absolute right to the plaintiff to withdraw the suit at the stage of second appeal and that the matter of withdrawal of the suit under the aforesaid provisions of the Code lay within the discretion of the Court. This case was cited with approval in the case of *Vidhyadhar Dube v. Har Charan* (1970 A. L. J. 732). The observation of the single Judge in *Kamta v. Gaya Prasad* (A. I. R. 1972 Alld. 143) that the view taken in *Kedar Nath's* case has been rendered nugatory due to the law laid down by the Supreme Court in the case of *M/s. Hulas Rai v. K. B. Bass & Co.* (A. I. R. 1963 S. C. 111) does not appear to be justified. The case of *M/s. Hulas Rai* has nothing to do with the right of an appellant to withdraw the suit at the appellate stage. (*Kanhaiya v. M/s. Dhaneshwari*, 1972 A. L. J. 575).

Limitation.—The fact that a suit is withdrawn does not entitle the plaintiff in a fresh suit to any deduction of time during which the former suit had been pending.

The appellate court has the same power to allow withdrawal of a suit with or without liberty as the trial court has. The proper procedure is to set aside the decree of the trial court and then grant permission to withdraw the suit.

Compromise of suit.—Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit :

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the court shall decide the question but no adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment.

Explanation : An agreement or compromise which is void or voidable under the Indian Contract Act, 1872, shall not be deemed to be lawful within the meaning of this rule. (O. 23, r. 3).

Order 23, r. 3 C. P. C. provides for two things: Firstly, it enjoins the court to be satisfied that a suit has been adjusted wholly or in part for a lawful compromise. Then after it is so satisfied, it has to order that such agreement, compromise or satisfaction be recorded and then it has to pass a decree in accordance therewith, so far as it relates to the suit. The words "so far as it relates to the suit" clearly contemplate that though a court may record a compromise but when it comes to the passing of a decree, the decree must be confined only to what relates to the suit. In other words, matters extraneous to the suit are not to be incorporated in the operative part of a decree. It should be confined to the actual subject-matter of the then existing *litigation*. As regards execution of a compromise decree, to the extent the terms of any compromise fall outside the limits of the suit they are not to be incorporated

in the decree and even if they are so incorporated on account of the compromise as a whole having been made a part of the decree, the decree will remain executable only to the extent it is within the limits of the suit and no more. (*Kanmal v. Hukamchand*, A. I. R. 1966 Raj. 178).

The rule does not confer any discretion to the court. When it is established that a suit has been adjusted either wholly or in part by a lawful compromise, it is the duty of the court to record it and pass a decree in accordance therewith except that the court has an inherent power not to allow the proceedings to be used to work a substantial injustice. But if the agreement or compromise is unlawful, as where it is opposed to public policy, the court has no jurisdiction to pass a decree on the compromise even though both parties consent thereto.

It is incumbent on the Court to pass a decree in accordance with the agreement or compromise, only if the agreement or compromise is lawful ; in other words, if it is enforceable in law. One test may be applied to determine whether the agreement or compromise is lawful : were the parties competent to enter into the full agreement or compromise in order to achieve the purpose they had in view. [*Karuna Shankar Dube v. Krishna Kant Shukla*, 1972 A. L. J. Lucknow, p. 387].

Bar to suit.—No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. (O. 23, r. 3-A).

No agreement or compromise to be entered in a representative suit without leave of court.—No agreement or compromise in a representative suit shall be entered into without the leave of the court expressly recorded in the proceedings ; and any such agreement or compromise entered into without the leave of the court so recorded shall be void.

Before granting such leave, the court shall give notice in such manner as it may think fit to such persons as may appear to it to be interested in the suit.

Explanation : In this rule, “representative suit” means,—(a) a suit under s. 91 or s. 92, (b) a suit under r. 8 of O. I, (c) a suit in which the manager of an undivided Hindu family sues or is sued as representing the other members of the family, (d) any other suit in which the decree passed may, by virtue of the provisions of the Code or of any other law for the time being in force, bind any person who is not named as party to the suit. (O. 23, r. 3-B).

Proceedings in execution of decrees or orders are not affected by the rules relating to withdrawal and adjustment of suits mentioned above. (O. 23, r. 4).

PAYMENT INTO COURT

[Order XXIV]

Where the defendant in a suit for recovery of a debt or damages deposits in court money in full satisfaction of the plaintiff's claim, notice of the deposit is to be given by the defendant to the plaintiff through the court. The amount is paid to the plaintiff on his application. No interest is allowed to the plaintiff on such sum after notice. Where the plaintiff accepts such amount as satisfaction in part only of his claim, he may prosecute his suit for the balance ; and, if the court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff is saddled with the

costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim. If the plaintiff accepts such sum as satisfaction in full of his claim, he shall so state to the court which may pronounce judgment accordingly, and in awarding costs, the court shall consider which of the parties was most to blame for the litigation. (O. 24, rr. 1-4).

SECURITY FOR COSTS

[Order XXV]

When security for costs may be demanded.—At any stage of a suit, the court may, either of its own motion or on the application of any defendant, order the plaintiff, for reasons to be recorded, to give within the time fixed by it, security for the payment of all costs incurred and likely to be incurred by any defendant : provided that such an order shall be made in all cases in which it appears to the court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are, residing out of India and that such plaintiff does not possess or that no one of such plaintiffs possesses any sufficient immovable property within India other than the property in suit. [O. 25, r. (1)].

Residence out of India.—Whoever leaves India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of India within the meaning of the proviso to sub-rule (1). [O. 25, r. 1 (2)].

Effect of failure to furnish security.—Where the security for the payment of costs, when ordered, is not furnished within the time fixed, the court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

Where a suit is dismissed for failure to furnish security for costs, the plaintiff may apply for an order to set the dismissal aside and, if it is proved to the satisfaction of the court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit. But the dismissal shall not be set aside unless notice of such application has been served on the defendant. (O. 25, r. 2).

PART IV

SUITS IN PARTICULAR CASES

(Sections 79-88, Orders XXVII to XXXV, XXXVII
and XLIV)

SUITS BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY

[Ss. 79—82]

79. Suits by or against Government.—In a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be, shall be—

- (a) in the case of a suit by or against the Central Government, the Union of India, and
- (b) in the case of a suit by or against a State Government, the State

80. Notice.—(1) Save as otherwise provided in sub-s. (2), no suit shall be instituted against the Government (including the Government of the State of Jammu and Kashmir), or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of—

(a) in the case of a suit against the Central Government, except where it relates to a railway, a Secretary to that Government ;

(b) in the case of a suit against the Central Government, where it relates to a railway, the General Manager of that Railway ;

(bb) in the case of a suit against the Government of the State of Jammu and Kashmir, the Chief Secretary to that Government or any other officer authorised by that Government in this behalf ;

(c) in the case of a suit against any other State Government, a Secretary to that Government or the Collector of the District ; and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims ; and the plaint shall contain a statement that such notice has been so delivered or left.

(2) A suit to obtain an urgent or immediate relief against the Government (including the Government of the State of Jammu and Kashmir) or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted, with the leave of the Court, without serving any notice as required by sub-section (1); but the Court shall not grant relief in the suit, whether interim or otherwise, except after giving to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit :

Provided that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of sub-section (1).

(3) No suit instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity shall be dismissed merely by reason of any error or defect in the notice referred to in sub-section (1), if in such notice—

(a) the name, description and the residence of the plaintiff had been so given as to enable the appropriate authority or the public officer to identify the person serving the notice and such notice had been delivered or left at the office of the appropriate authority specified in sub-section (1), and

(b) the cause of action and the relief claimed by the plaintiff had been substantially indicated.

Section 80 deals with two things—first with the service of the notice in writing and the second with a rule of procedure as to what the plaint should contain. The object of the section is manifestly to give the Government or the public officer sufficient notice of the case which is proposed to be brought against it or him so that it or he may consider the position and decide for itself or himself whether the claim of the plaintiff should be accepted or resisted. The object of notice is to afford the Government—Central or State—an opportunity to reconsider the legal position, and to settle the claim without litigation, if so advised, or to afford restitution without recourse to a court of law. The section is explicit and mandatory and admits of no exceptions.

Section 80, C. P. C., is express and explicit and admits of no implications or exceptions, and it imposes a statutory and unqualified obligation on the Court to see that its terms are strictly complied with. (*Governor-General-in-Council v. Krishnaswami Pillai*, I. L. R. 1946 Mad. 36).

A notice given before the cause of action has arisen is invalid. [*Kessoram v. Secretary of State*, (1928) 54 Cal. 969].

Notice under section 80 need not be practically a copy of the plaint. It

should be such as to give substantial information to the Government as to the basis of the claim and the relief which the plaintiff seeks. It need not set out all the details or facts of the case which the plaintiff intends to prove, nor is it incumbent upon the plaintiff to give in detail all the forms in which he would seek relief. In order to enable the Government or the public officer to arrive at a decision it is necessary that it or he should be informed of the nature of the suit proposed to be filed against it or him and the facts on which the claim is founded and the precise relief asked for. Though the terms of this section are to be strictly complied with, that does not mean that the terms of the notice should be scrutinised in the pedantic manner or in a manner completely divorced from common sense. (*State of Madras v. C. P. Agencies*, A.I.R. 1960 S. C. 1309).

Essential Requirements.—The three essential requirements of S. 80 are : first, the addressee should be identified and must have received the communication, secondly, there should be no vagueness or indefiniteness about the person giving the notice, who must also be the person filing the suit and the notice must also give the details which are specified in S. 80 ; and, thirdly, the two months' time allowed must expire before the suit is laid. Once these requirements are fulfilled minor details like the misdescription of the person to whom the communication is addressed would not make it an improper notice which does not comply with the requirements of S. 80, C. P. C. (*Governor-General-in-Council v. Sankarappa*, (1953) 2 M. L. J. 76).

The object of the notice under S. 80, C. P. C., is to give to the Government or the public servant concerned an opportunity to reconsider its or his legal position and if that course is justified to make amends or settle the plaint out of court. The section is no doubt imperative ; failure to serve notice complying with the requirements of the statute will entail dismissal of the suit. But the notice must be reasonably construed. Any unimportant error or defect cannot be permitted to be treated as an excuse for defeating a just claim. In considering whether the provisions of the statute are complied with, the Court must take into consideration the following matters in each case : (1) whether the name, description and residence of the plaintiff are given so as to enable the authorities to identify the person serving the notice ; (2) whether the cause of action and the relief which the plaintiff claims are set out with sufficient particularity ; (3) whether a notice in writing has been delivered to or left at the office of the appropriate authority mentioned in the section ; and (4) whether the suit is instituted after the expiration of two months next after notice has been served, and the plaint contains a statement that such a notice has been delivered or left. In construing the notice the Court cannot ignore the object of the Legislature, viz., to give to the Government or public servant concerned an opportunity to reconsider its or his legal position. If on a reasonable reading of the notice the plaintiff is shown to have given the information which the statute requires him to give, any incidental defects or irregularities should be ignored. It is true that the terms of S. 80, C. P. C., must be strictly complied with but that does not mean that the terms of the notice should be scrutinised in an artificial or pedantic manner. (*Beohar Rajendra Singh v. State of Madhya Pradesh*, [1970 (1) S. C. J., 118]).

Section 80, according to its plain meaning, requires that there should be identity of the person who issues the notice with the person who brings the suit. Where an individual carries on business in some name and style, the notice has to be given by the individual in his own name, for the suit can only

be filed in the name of the individual. Where the notice under S. 80 was given by Messrs. S. N. Dutt and Co., and the suit was filed by S. N. Dutt, sole proprietor of a business carried on under the name and style of S. N. Dutt and Co., it has been held that the person giving the notice was not the same as the person suing and that, therefore, S. 80 was not complied with. (*S. N. Dutt v. Union of India*, A. I. R. 1961 S. C. 1949 ; and *M/s. Naseema Textiles Azhikode v. Union of India*, A. I. R. 1971 Kerala, p. 192).

When notice was sent on behalf of an individual and the suit was brought by a firm, the notice does not comply with the requirements of section 80, C. P. C. (*Mohanlal v. Dominion of India*, 1954 N. L. J. Sh. N. 300).

Registration of a firm is necessary for the institution of a suit. (*State of Madras v. C. P. Agencies*, I. L. R. 1955 Nag. 62).

✓ The notice to a public officer is necessary only if the suit is in respect of an act done by the officer purporting to be done in his official capacity, but if the suit relates to an act done by him in his individual capacity no notice is required.

✓ A public servant can only be said to act or purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. If the act was one such as is ordinarily done by the officer in the course of his official duties, and he considers himself to be acting as a public officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity. (*Dr. Bishambhar Sahi Gupta v. Shambhu Dayal*, 1930 A. 704). Two conditions are clearly necessary for the section to apply : (1) he must be a public officer ; and (2) he must purport to act in his official capacity. (*Gill v. The King*, 75 I. A. 41).

A public officer may, without such a notice, be made a defendant in a suit in which no act of his done in the course of his official duties is in question but he is made a party for some reason or the other. (*Jatindramohan Ghosh v. Rebatimohan Das*, 59 C. 961). Notice is necessary only if the act was done in official capacity whether or not in good faith. (*Bachicha Singh v. Jafar Beg*, 30 I. C. 173).

As said above, a public servant can only be said to act or purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. A kick administered by him is not an act which lies within the sphere of his official duty. [*Vishnu v. Smith Pearse*, I. L. R. (1949) Nag. 232].

✱ The fact that the capital of a corporation was provided by the Central Government or that its working was supervised or directions were issued by the Central Government, does not make it a Government within the meaning of S. 80. Although the expression 'Government' has not been defined in the Code, it cannot include a 'corporation' constituted under an Act of Parliament. (*Kamta Prasad Singh v. The Regional Manager, Food Corporation of India*, A. I. R. 1974 Patna, 376). Where the officers of such corporation are in its service and pay, they are not public officers within the meaning of S. 80, C. P. C. (*ibid*)

In consonance with the opinion of the Joint Committee of both Houses of Parliament, some relaxation of the provisions of S. 80 have been made by the Amendment Act, 1976. It has been enacted that a suit may be instituted with the leave of the court, for obtaining an urgent or

immediate relief against the Government or of any public officer in respect of any act purporting to have been done by such public officer in his official capacity without serving any notice under S. 80, C. P. C.; but the court shall not grant relief in the suit, whether interim or otherwise, except after giving to the Government or the public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit.

Further sub-s. (3) has been added to S. 80 with a view to seeing that the just claims of persons are not defeated on technical grounds, and it has been enacted that the suit against the Government or a public officer should not be dismissed merely by reason of any technical defect or error in the notice or any irregularity in the service of the notice if the name, description and residence of the plaintiff has been so given in the notice as to enable the appropriate authority or the public officer to identify the person serving the notice, and the notice has been delivered or left at the office of the appropriate authority, and the cause of action and the relief claimed have been substantially indicated in the notice. X

Suit for injunction.—Section 80 as it stands applies to all suits, whether they are suits for declaration or suits for injunction, mandatory or prohibitory, and suits for damages. The expression “act purporting to be done” takes in past as well as future acts. The expression “in respect of” is of very wide amplitude as the contemplated suit may be for any relief which flowed from the allegations in the plaint, but the suit must have relation to or must have reference to an act purporting to be done by a public officer in his official capacity. If the allegations in the plaint relate to acts purporting to be done by such public officer, whatever the relief may be that is prayed for, the section is attracted and the notice is mandatory. In the case of a threatened injury which is sought to be restrained by an injunction, it is difficult to imagine a plaint which does not contain allegations on which the fear of the threat complained of could be justified. Hence, in a suit where there is a prayer for declaration and for injunction, a notice under section 80 is necessary. (A. I. R. 1957 Andh Pra. 675).

Contents of notice.—A notice under S. 80, C. P. C. imputing negligence on the part of the railway administration or its servants must state, in sufficient details, particulars of negligence, carelessness, or misconduct, to enable the administration to decide whether the plaintiff's claim be accepted or resisted. The furnishing of such particulars was all the more necessary when under the law the burden lay upon the plaintiff to prove that the loss was occasioned by negligence or misconduct on the part of the railway administration or its servants. A bare allegation of negligence or misconduct would not be sufficient.

Mandatory Provisions.—Though S. 80 of the Code is mandatory, yet the court should not be hypercritical in examining the language used but should interpret the same in a free and liberal spirit. Where it is not denied that notice in accordance with S. 80 (b) was given by registered post and the notice was duly served, it was mentioned in the plaint that the notice had been given, and the acknowledgment due receipt duly signed on behalf of the defendant was filed in court, then the mere fact that the plaintiff mentioned that he had given notice instead of mentioning that the notice had been delivered cannot justify the dismissal of the plaint. (*Messrs. Rekh Chand Nop Chand v. The Governor-General-in-Council*, A. I. R. 1954 A. L. J. 159).

The notice under S. 80. C.P.C., was addressed to the Secretary of Central Government for Railway instead of being sent to the General Manager of the East Indian Railway as required by law. This notice, however, which was sent to the Secretary was sent by the Assistant Director, Railway Board, to the General Manager, East Indian Railway, and a letter was addressed by the Assistant Director to the plaintiff saying that the notice had been forwarded to the General Manager and it must be taken to have reached him in the ordinary course of official business. It was held that the suit could not be said to be defective for want of notice under S. 80 of the Code of Civil Procedure. (*Kalwaldhari Singh v. Indian Dominion*, 1956 A. L. J. 730).

A fresh notice under S. 80, C. P. C. is not necessary where a suit is instituted but that suit is withdrawn with liberty to file a fresh suit. If the plaint which is being considered by the court has been preceded by a notice which satisfies the requirements of S. 80, C P. C., then the fact that before the plaint then under consideration, there had been another plaint which had been filed and withdrawn cannot, on any principle, be held to have exhausted or extinguished the vitality of the notice issued. (*Amar Nath v. Union of India*, A. I. R. 1963 S. C. 424).

Construction of notice.—Where there are several heads of claim of damages for the breach of contract against the Government, though they all arise out of a single contract then on a reasonable and proper construction of S. 80, C. P. C., the authority on whom the notice of the claim is served has a right to be informed what the claim of the party is in respect of each of the several heads. It is, no doubt, true that a notice under S. 80 is not a pleading and need not be a copy of the plaint and that no particular or technical form is prescribed for such a notice, still having regard to the object for which S. 80 has been enacted the details which it contains should be sufficient to inform the party on whom it is served of the nature and basis of the claim and the relief sought. A notice has to be interpreted not pedantically but in the light of commonsense without one being hypercritical about the language ; but the question to be considered is whether in the notice there is substantial information conveyed on the basis of which the recipient of the notice could consider the claim of the would be plaintiff and avert the suit. (*Amar Nath Dogra v. Union of India*, A. I. R. 1963 S. C. 424).

In any suit by or against the Government, the plaint or written statement shall be signed by such person as the Government may, by general or special order, appoint in this behalf, and shall be verified by any person whom the Government may so appoint and who is acquainted with the facts of the case. (O. 27, r. 1).

In suits by or against the Government, instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert the appropriate name as provided in S. 79. (O. 27, r. 3).

The Government pleader in any court shall be the agent of the Government for the purpose of receiving processes against the Government issued by such court. (O. 27, r. 4).

The court, in fixing the day for the Government to answer to the plaint, shall allow a reasonable time for the necessary communication with the Government through the proper channel, and for the issue of instructions to the Government pleader to appear and answer on behalf of the Government,

and may extend the time at its discretion but the time so extended shall not exceed two months in the aggregate. (O. 27, r. 5).

Where a suit is instituted against a public officer for damages or other relief in respect of any act alleged to have been done by him in his official capacity, the Government shall be joined as a party to the suit. (O. 27, r. 5A).

Duty of court in suits against the Government or a public officer to assist in arriving at a settlement.—In every suit or proceeding to which the Government, or a public officer acting in his official capacity, is a party, it shall be the duty of the court to make, in the first instance, every endeavour, where it is possible to do so consistently with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject-matter of the suit. If in any such suit or proceeding, at any stage, it appears to the court that there is a reasonable possibility of a settlement between the parties, the court may adjourn the proceeding for such period as it thinks fit, to enable attempts to be made to effect such a settlement. (O. 27, r. 5 B)

81. Exemption from arrest and personal appearance.—In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity—

- (a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and
- (b) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

Before parting with this a word may be said about the execution of decree passed against the Government or a public officer.

82. Execution of decree.—(1) Where in a suit by or against the Government, or by or against a public officer in respect of any act purporting to be done by him in his official capacity, a decree is passed against the Union of India or a State, or, as the case may be, the public officer, such decree shall not be executed except in accordance with the provisions of sub-s. (2).

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such decree.

(3) The provisions of sub-sections (1) and (2) shall apply in relation to an order or award as they apply in relation to a decree, if the order or award—

- (a) is passed or made against the Union of India or a State or a public officer in respect of any such act

as aforesaid, whether by a Court or by any other authority, and

(b) is capable of being executed, under the provisions of this Code or of any other law for the time being in force as if it were a decree.

Section 82, before its amendment by the Amendment Act, 1976, provided that where in a suit a decree was passed against the Union of India or a State or a public officer a time shall be specified in the decree within which it shall be satisfied ; and, if the decree was not satisfied within the time so specified or within three months from the date of the decree, where no time was so specified, the court shall report the case for the orders of the State Government. Execution was not to issue on any such decree unless it remained unsatisfied for the period of three months computed from the date of such report. That section has been amended so as to eliminate the requirement about specifying in the decree the period within which it was to be satisfied and the intermediate report to Government about the decree remaining unsatisfied. This provision has been made so that the decree-holder may not be deprived of the fruits of his decree for an indefinite period. The above provisions also apply in relation to an order or award passed against the Union of India, a State or public officer.

Suits involving a substantial question of law as to the interpretation of the Constitution

In a suit in which it appears to the court that any such question as is referred to in clause (1) of Article 132, read with Article 147 of the Constitution, is involved, the court shall not proceed to determine the question until after notice has been given to the Attorney-General for India, if the question of law concerns the Central Government, and to the Advocate-General of the State, if the question of law concerns a State Government. The Court may at any stage of the proceedings order the Central Government or a State Government to be added as a defendant in a suit. [O. 27-A, rr. 1 and 2 3.]

Procedure in suits involving validity of any statutory instrument.—In any suit in which it appears to the court that any question as to the validity of any statutory instrument, not being a question of the nature mentioned in r. 1, is involved, the court shall not proceed to determine that question except after giving notice (a) to the Government Pleader, if the question concerns the Government, or (b) to the authority which issued the statutory instrument, if the question concerns an authority other than the Government. (O. 27-A, r. 1-A).

In this Order 'statutory instrument' means a rule, notification, bye-law, order, scheme or form made as specified under any enactment.

Power of court to add Government or other authority as a defendant in a suit relating to the validity of any statutory instrument.—The court may, at any stage of the proceedings in any suit involving any such question as is referred to in r. 1-A, viz., validity of any statutory instrument, order that the Government or other authority shall be added as a defendant if the Government Pleader or the pleader appearing in the case for the authority which issued the instrument, as the case may be, whether upon receipt of notice under r. 1-A or otherwise, applies for such addition, and the court is satisfied that such addition is neces-

sary or desirable for the satisfactory determination of the question. (O.27-A, r. 2-A).

Costs.—Where, under r. 2 or r. 2-A, the Government or any other authority is added as a defendant in a suit, the Attorney-General, Advocate-General, or Government Pleader or Government or other authority shall not be entitled to, or liable for, costs in the court which ordered the addition unless the court, having regard to all the circumstances of the case for any special reason, otherwise orders. (O. 27-A, r. 3).

**Suits by Aliens and by or against Foreign Rulers,
Ambassadors and Envoys**

[Ss. 83-87-A]

83. When aliens may sue. Alien enemies residing in India with the permission of the Central Government, and alien friends¹, may sue in any Court otherwise competent to try the suit, as if they were citizens of India, but alien enemies residing in India without such permission, or residing in a foreign country, shall not sue in any such Court.

Explanation.—Every person residing in a foreign country, the Government of which is at war with India and carrying on business in that country without a licence in that behalf granted by the Central Government, shall, for the purpose of the section, be deemed to be an alien enemy residing in a foreign country.

The test of alien enemy is residence or place of business and not nationality. But the overrunning of an alien country by an enemy does not, by itself, render a person resident in such country or a company incorporated therein and carrying on business as an alien enemy. (*Manasseh Film Co. v. Gemini Picture Circuit*, 1944 Mad. 239). The Government of the country of residence must be at war. (*ibid*).

This section does not bar a suit against alien enemies so that an alien enemy, whether the cause of action arose before or after the war, can be sued in an Indian court and would have every right to prosecute his case and offer his defence, no matter that he was interned at the time.

84. When foreign States may sue.—A foreign State may sue in any competent Court :

Provided that the object of the suit is to enforce a private right vested in the Ruler of such State or in any officer of such State in his public capacity.

A foreign State may sue in any competent court, provided that such foreign State has been recognised by the Central Government and provided that the object of the suit is to enforce a private right vested in the Ruler of such State or in any officer of such State in his public capacity.

The term "private right" means a right which may be enforced by a foreign State against private individuals as distinguished from rights which

1. Without any such permission.

one State in its political capacity may have as against another State in its political capacity. (*Hajen Manick v. But Singh*, 11 C. 17).

The object of litigation by a foreign State cannot be to enforce the right vesting in a subject as such as a private subject : it must be the enforcement of a private right vested in the head of a State or in any officer of such State in his public capacity. The private right to which the proviso refers is, on the ultimate analysis, the right vesting in the State ; it may vest in the Ruler of a State or in any officer of such State in his public capacity, but it is a right which really and in substance vests in the State. It is in respect of such a right that a foreign State is authorised to bring a suit under S. 84. (*Mirza Ali Akbar Kashani v. United Arab Republic*, A. I. R. 1966 S.C. 230).

The term "ruler", in relation to a foreign State, means the person who is for the time being recognised by the Central Government to be the head of the State.

Every court shall take judicial notice of the fact (a) that a State has or has not been recognised by the Central Government and (b) that a person has or has not been recognised by the Central Government to be the head of a State.

85. Persons specially appointed by Government to prosecute or defend on behalf of foreign Rulers.—(1) The Central Government, at the request of the Ruler of a foreign State or at the request of any person competent in the opinion of the Central Government to act on behalf of such Ruler, by order, appoint any persons to prosecute or defend any suit on behalf of such Ruler, and any persons so appointed shall be deemed to be the recognised agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Ruler.

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may, from time to time, be necessary to prosecute or defend on behalf of such Ruler.

(3) A person appointed under this section may authorise or appoint any other persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto.

Persons specially appointed by order of the Central Government at the request of a foreign State, to prosecute or defend any such suit on his behalf, shall be deemed to be the recognised agents for the prosecution of such suit.

86. Suits against Foreign Rulers, Ambassadors and Envoys.—(1) No foreign State may be sued in any Court otherwise competent to try the suit except with the consent of the Central Government certified in writing by Secretary to that Government :

Provided that a person may, as a tenant of immovable property, sue without such consent as aforesaid a foreign State from whom he holds or claims to hold the property.

(2) Such consent may be given with respect to a specified suit or to several specified suits or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the foreign State may be sued, but it shall not be given, unless it appears to the Central Government that the foreign State—

(a) has instituted a suit in the Court against the person desiring to sue it, or

(b) by itself or another, trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon, or

(d) has expressly or impliedly waived the privilege accorded to it by this section.

(3) Except with the consent of the Central Government, certified in writing by a Secretary to that Government, no decree shall be executed against the property of any foreign State.

(4) The preceding provisions of this section shall apply in relation to—

(a) any Ruler of a foreign State ;

(aa) any Ambassador or envoy of a foreign State ;

(b) any High Commissioner of a Commonwealth country ;
and

(c) any such member of the staff of the foreign State or the staff or retinue of the Ambassador or envoy of a foreign State or of the High Commissioner of a Commonwealth country as the Central Government may, by general or special order, specify in this behalf,

as they apply in relation to a foreign State.

(5) The following persons shall not be arrested under this Code, namely :—

(a) any Ruler of a foreign State ;

(b) any Ambassador or Envoy of a foreign State ;

(c) any High Commissioner of a Commonwealth country ;

(d) any such member of the staff of the foreign State or the staff or retinue of the Ruler, Ambassador or Envoy of a foreign State or of the High Commissioner of a Commonwealth country, as the Central Government may, by general or special order, specify in this behalf.

(6) Where a request is made to the Central Government for the grant of any consent referred to in sub-section (1), the Central Government shall, before refusing to accede to the request in whole or in part, give to the person making the request a reasonable opportunity of being heard.

Section 6, as amended by the Amendment Act, 1976, has given adequate importance to the concept of State instead of a ruler and has accordingly substituted for the words "Ruler of a foreign State" the words "a foreign State", although the provisions relating to suits against a foreign State embodied in this section apply also to any ruler of a foreign State.

Further sub-section (5) newly added by the Amendment Act, 1976, lays down that the following persons shall not be arrested under the Code, namely :—

(a) any Ruler of a foreign State ;

(b) any Ambassador or Envoy of a foreign State ;

(c) any High Commissioner of a Commonwealth country ;

(d) any such member of the staff of the foreign State or the staff or retinue of the Ruler, Ambassador or Envoy of a foreign State or of the High Commissioner of a Commonwealth country, as the Central Government may, by general or special order, specify in this behalf.

The immunity under S. 86, C. P. C., upon the Ruler of a foreign State is limited to a suit and does not extend to any other proceedings. This section does not contemplate the obtaining of a consent at any other stage except at the institution. (*Maharaja Indrajitsingh Vijayasinghji v. Maharaja Rajendra-singhji Vijayasinghji*, I. L. R. 1955 Bom. 912).

Meaning of the term 'sued' in Ss. 86 & 87-B.—A person is 'sued' not only when the plaint is filed, but also when the suit remains pending against him. The word "sued" covers the entire proceeding in an action. It follows that consent is necessary not only for the filing of the suit against the ex-Ruler but also for its continuation from the time consent is required. Neither the suit could be filed nor a suit already filed could be maintained except with the consent of the Central Government. The prohibition in S. 87-B, therefore, affects not only a suit instituted after the enactment of S. 87-B but one which though instituted before its enactment, is pending. (*Mohanlal Jain v. Sawal Man Singhji*, A. I. R. 1969 Supreme Court, 73).

Doctrine of immunity of foreign Sovereign State from being sued in India how far modified.—The provision in S. 86 (3) that a decree passed against a foreign State or its Ruler shall not be executed against the property of such

State or Ruler does not tend to show that the Ruler of a foreign State within S. 86 (1) must be the Ruler himself and not the State. On the other hand, it tends to show that what is exempted is the separate property of the Ruler himself and not the property of the Ruler as head of the State. Section 86 (1) has the effect of modifying to a certain extent the doctrine of immunity recognised by International Law. The section provides that foreign States can be sued within the municipal courts of India with the consent of the Central Government and upon such consent being granted as required by S. 86 (1), it would not be open to a foreign State to rely on the doctrine of immunity under International Law. In substance, S. 86 (1) is not merely procedural; in a sense it is a counterpart of S. 84. Whereas S. 84 confers a right on a foreign State to sue, S. 86 (1) in substance imposes a liability on foreign States to be sued, though this liability is circumscribed and safeguarded by the limitation prescribed by it. (*Mirza Ali Akbar Kashani v. United Arab Republic*, A. I. R. 1966 S. C. 230).

It is apparent from a perusal of S. 86 of the Civil Procedure Code that there is no absolute prohibition against a foreign State or its Ruler being sued in India. A foreign State or its Ruler can be sued with the consent of the Central Government certified in writing by a Secretary to that Government. It is also provided that such consent should not be given unless it appears to the Central Government that the Ruler has instituted a suit in the Court against the person desiring to sue him or by himself or another trades within the local limits of the jurisdiction of the Court, or is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon, or has expressly or impliedly waived the privilege accorded to him by this section. (*Harindar Singh v. Income-Tax Commissioner, Punjab*, A. I. R. 1972 S. C., p. 202).

87. Style of foreign Rulers as parties to suits.—The Ruler of a foreign State may sue, and shall be sued, in the name of his State :

Provided that in giving the consent referred to in section 86, the Central Government may direct that the Ruler may be sued in the name of an agent or in any other name.

The Ruler of a foreign State may sue, and shall be sued, in the name of his State, but the Central Government may, while giving the consent referred to in S. 86 above, direct that the Ruler may be sued in the name of an agent or in any other name. It may be noted that the Ruler has not to be arrayed as a plaintiff or defendant; it is his State that is arrayed as such.

The provisions of Ss. 86 and 87 are based on public policy and are imperative. A suit against a Ruler without the consent of the Central Government is only permissible where the plaintiff is a tenant under the Ruler and the suit relates to lands held by him. Otherwise the permission of the Central Government is mandatory, and when permission has been applied for and refused by the Government it is not open to the court to question the propriety of the order refusing consent. Similarly, where consent has been obtained, the certified consent is conclusive evidence that the conditions required for the giving of consent existed, and it is not for the court to go behind the certificate or to entertain an objection on the ground of the absence of the conditions requisite for the grant of sanction by the Central Government, in the absence of special circumstances justifying an investiga-

tion into the facts. The court should not ordinarily try for itself what S. 86 has left to the Central Government. (*Govindram Gordhandas Seksaria v. State of Gondal*, 77 I. A. 156).

87-A. Definitions of "Foreign State" and "Ruler".—
(1) In this Part,

(a) "foreign State" means any State outside India which has been recognised by the Central Government ; and

(b) "Ruler", in relation to a foreign State, means the person who is for the time being recognised by the Central Government to be the head of that State.

(2) Every Court shall take judicial notice of the fact—

(a) that a State has or has not been recognised by the Central Government ;

(b) that a person has or has not been recognised by the Central Government to be the head of a State.

Suits against Rulers of former Indian States

[S. 87-B]

87-B. Application of Ss. 85 and 86 to Rulers of former Indian States.—(1) In the case of any suit by or against the Ruler of any former Indian State which is based wholly or in part upon a cause of action which arose before the commencement of the Constitution or any proceeding arising out of such suit, the provisions of S. 85 and sub-sections (1) and (3) of S. 86 shall apply in relation to such Ruler as they apply in relation to the Ruler of a foreign State.¹

(2) In this section—

(a) "former Indian State" means any such Indian State as the Central Government may, by notification in the Official Gazette, specify for the purpose of this section ;

(b) "commencement of the Constitution" means the 26th day of January, 1950 ; and

(c) "Ruler", in relation to a former Indian State, has the same meaning as in Article 363 of the Constitution.¹

The original provisions contained in S. 87-B (1) implemented the assurances given to princes as their privileges at the time of the integration of Indian States. The amended provisions also safeguard the interests of the ruler of a former Indian State to a limited extent. Under the provisions of Art. 363 of the Constitution 'Ruler' includes the Prince, Chief or other person recognised before the commencement of the Constitution by his Majesty or the Government of the Dominion of India as the Ruler of any Indian State.

1. As amended by the Rulers of Indian States (Abolition of Privileges) Act, 1972, (Act No. 54 of 1972).

Suits by or against Military or Naval Men or Airmen**(Order XXVIII)**

The procedure for filing or defending a suit in the case of a soldier, sailor or airman is prescribed in Order 28 of the Code of Civil Procedure and lays down that where any officer, soldier, sailor or airman on active service is a party to a suit and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorise any person to sue or defend in his stead. The authority shall be in writing and shall be signed by the officer, soldier, sailor or airman in the presence of (a) his commanding officer, or the next subordinate officer, if the party is himself the commanding officer, or (b) where the officer, soldier, sailor or airman is serving in military, naval or airforce staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority, which shall be filed in court.

When so filed the counter-signature shall be sufficient proof that the authority was duly executed, and that the officer, soldier, sailor or airman by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

Any person authorised by an officer, soldier, sailor or airman to prosecute or defend a suit in his stead may act personally or appoint a pleader. (O. 28, rr. 1-2).

Suits by or against Corporation**(Order XXIX)**

In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation, by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case. (O. 29, r. 1).

Subject to any provision regulating service of process, where the suit is against a corporation, the summons may be served –

(a) on the secretary or any director, or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corporation at the registered office or if there is no registered office then at the place where the corporation carries on business. (O. 29, r. 2).

The court may, at any stage of the suit, require the personal appearance of the secretary or any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit. (O. 29, r. 3).

Suits by or against firms**(Order XXX)**

The procedure relating to the suits by or against firms is given in Order 30 of the Code. It states that any two or more persons claiming or being liable as partners and carrying on business in India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and addresses of

the persons who were, at the time of the accruing of the cause of action, partners in such firm. In a suit by or against a firm, the pleadings may be signed and verified by any one of the partners. (O. 30, r. 1).

SUIT BY A FIRM : Where a suit is instituted by partners in the name of the firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted. [O. 31, r. 2 (1)]. Failure to comply with such demand may necessitate the staying of proceedings. [O. 30, r. 2 (2)]. Where the names of the partners are declared in the manner referred to in sub-r. (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint, provided that all proceedings shall nevertheless continue in the name of the firm, but the name of the partners disclosed in the manner specified in sub-r. (1) shall be entered in the decree. [O. 30, r. 2 (3)].

SUIT AGAINST A FIRM : Where persons are sued as partners in the name of their firm, the summons shall be served either—

(a) upon any one or more of the partners, or

(b) at the principal place at which the partnership business is carried on within India upon any person having at the time of service, the control or management of the partnership business there, as the court may direct.

Where the partnership has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons is to be served upon every person within India whom it is sought to make liable. (O. 30, r. 3).

When persons are sued as partners in the name of their firm, they must appear individually in their own names, as a firm cannot appear in the firm name ; but all subsequent proceedings shall nevertheless continue in the name of the firm. (O. 30, r. 6).

On the death of a partner, whether before the institution or during the pendency of any suit, it is not necessary to join the legal representative of the deceased as a party to the suit. (O. 30, r. 4).

In what capacity served.—Where a summons is issued to a firm, every person upon whom it is served shall be informed by notice in writing given at the time of such service in what character he is served, whether as a partner or as a person having the control or management of the partnership business or in both ; and in default of such notice, the person served will be deemed to be served as a partner. (O. 30, r. 5).

Appearance under protest.—Any person served with summons as a partner under r. 3 may enter an appearance under protest, denying that he was a partner at any material time. On such appearance being made, either the plaintiff or the person entering the appearance may, at any time before the date fixed for hearing and final disposal of the suit, apply to the court for determining whether that person was a partner of the firm and liable as such. If, on such application, the court holds that he was a partner at the material time, that shall not preclude the person from filing a defence denying the liability of the firm in respect of the claim against the defendant. If the court, however, holds that such person was not a partner of the firm and was not liable as such, that shall not preclude the plaintiff from otherwise serving a

summons on the firm and proceeding with the suit ; but, in that event, the plaintiff shall be precluded from alleging the liability of that person as a partner of the firm in execution of any decree that may be passed against the firm. (O. 30, r. 8)

Order 30 shall apply to suits between a firm and one or more of the partners therein and to suits between a firm having one or more partners in common ; but no execution shall be issued in such suits except by leave of the court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just. (O. 30, r. 9).

Any person carrying on business in a name or style other than his name, or a Hindu undivided family carrying on business under any name, may be sued in such name or style as if it were a firm name, and, in so far as the nature of such case permits, all rules under O. 30 shall apply accordingly. (O. 30, r. 10).

Note : For execution of a decree against Firm and Attachment of Partnership Property, see the relevant provisions contained in Part II at pages 170 and 183 respectively of the book).

Suits by or against trustees, executors and administrators

[Order XXXI]

In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the beneficiaries and a third person, the trustee, executor or administrator shall represent the persons so interested, and it will not be necessary to make the beneficiaries parties to the suit, unless otherwise ordered by the court. Beneficiaries should, however, be added as parties when the trustees have an interest adverse to theirs. (O. 31, r. 1).

The husband of a married trustee, administratrix or executrix shall not be a party to a suit by or against her, unless the court directs otherwise. (O. 31, r. 1).

A claim as an executor, administrator or heir, as such, can be joined with a claim against him personally only when both the claims arise in reference to the same estate. (O. 2, r. 5).

Suits by or against minors and persons of unsound mind

[Order XXXII]

Minor is a person who has not completed the age of 18 years and in the case of a minor of whose person or property a guardian has been appointed by a court or whose property is under a Court of Wards, the age of majority is completion of 21 years.

Every suit by a minor shall be instituted in his name by a person who, in such suit, shall be called the next friend of the minor. The next friend should be a person who is of sound mind, who has attained majority, who is not a defendant and whose interest is not adverse to that of the minor. (O. 32, rr. 1 and 4).

Explanation I to r. 1 of O. 32 lays down that in this order "minor" means a person who has not attained his majority within the meaning of S. 3 of

the Indian Majority Act, 1875, where the suit relates to any of the matters mentioned in cls. (a) and (b) of S. 2 of that Act or to any other matter.

Clauses (a) and (b) of S. 2 of the Indian Majority Act, 1875, lay down that nothing herein contained shall affect (a) the capacity of any person to act in the following matters (namely), marriage, dower, divorce and adoption; (b) the religion or religious rites and usages of any class of citizens of India.

Under the provisions of Sec. 3 of the Indian Majority Act, 1875, every minor of whose person or property, or both, a guardian, other than a guardian for a suit within the meaning of Chapter XXXI [See now Sch. I, Order XXXII] of the Code of Civil Procedure, has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of 18 years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age shall, notwithstanding anything contained in the Indian Succession Act, or in any other enactment, be deemed to have attained his majority when he shall have completed his age of 21 years and not before.

Subject as aforesaid, every other person domiciled in India shall be deemed to have attained his majority when he shall have completed his age of 18 years and not before.

Where the suit is instituted without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented. (O. 32, r. 2).

Where the defendant is a minor, the court, on being satisfied of the fact of his minority, should appoint a proper person to be guardian for the suit for such minor, called the guardian *ad litem*. [O. 32, r. 3 (1)].

An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff. No order shall be made on any application except upon notice to any guardian of the minor appointed by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or, where there is no father, to the mother, or in their absence to other natural guardian of the minor or to the person in whose care the minor is. The court may also issue notice to the minor. [O. 32, r. 3 (2)].

A person appointed as guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional court and any proceedings in the execution of a decree. [O. 32, r. 3 (5)].

Where a suit has been instituted on behalf of the minor by his next friend, the court may, at any stage of the suit, either of its own motion or on the application of any defendant, and for reasons to be recorded, order the next friend to give security for the payment of all costs incurred or likely to be incurred by the defendant. Where such a suit is instituted by an indigent person, the security shall include the court-fees payable to the Government. (O. 32, r. 2A).

No decree passed against a minor shall be set aside merely on the ground that the next friend or guardian for the suit of the minor had an interest in the subject-matter of the suit adverse to that of the minor, but the fact that by

reason of such adverse interest of the next friend or guardian for the suit, prejudice has been caused to the interests of the minor, shall be a ground for setting aside the decree. (O. 32, r. 3-A).

No next friend or guardian for the suit shall, without the leave of the court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. [O. 32, r. 7 (1)]. An application for leave under sub-r. (1) shall be accompanied by an affidavit of the next friend or the guardian for the suit and also, if the minor is represented by a pleader, by the certificate of the pleader, to the effect that the agreement or compromise proposed is, in his opinion, for the benefit of the minor; provided that the opinion so expressed, whether in the affidavit or in the certificate shall not preclude the court from examining whether the agreement or compromise proposed is for the benefit of the minor. [O. 32, r. 7 (1A)]. Any such agreement or compromise entered into without the leave of the court so recorded shall be voidable against all parties other than the minor. [O. 32, r. 7 (2)].

Removal of next friend.—Where the interest of the next friend is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor, or where he does not do his duty, or during the pendency of the suit ceases to reside within India, or on any other sufficient cause, the court may, on an application made on behalf of the minor, order the next friend to be removed. On the retirement, removal or death of the next friend of a minor, further proceedings are stayed until the appointment of a next friend in his place. Similarly, a guardian may also be removed if he does not do his duty or allowed to retire by the court, and the court may appoint a new guardian in his place. (O. 32, rr. 9-11).

Powers of the next friend or guardian.—(1) In all suits to which any person under disability is a party any consent or agreement to a proceeding shall, if given or made with the express leave of the court by the next friend or guardian for the suit, be valid and binding on the minor. (S. 147). But he has no power without the leave of the court, expressly recorded in the proceedings, to enter into any such agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. (O. 32, r. 7). O. 32, r. 7 is one of the provisions designed to safeguard the interests of a minor during the pendency of a suit against hostile, negligent or collusive acts of a guardian. The protection is only during the pendency of the suit and for the purpose of O. 32, r. 6, an execution proceeding is a continuation of a suit. (*Dokhu Bhushayya v. K. Ramakrishnayya*, A. I. R. 1962 S. C. 1886).

Under O. 32, r. 7, C. P. C., it is not sufficient for the Court to grant leave to compromise after the compromise had been recorded and made a decree of the court. The leave of the court is a condition precedent to the passing of the decree. The guardian must obtain consent of the court before the compromise is concluded, *i. e.*, before the compromise is made a decree of the court. The conclusion of the compromise comes about when the compromise is made a decree of the court. [*Rajeswararao v. Satyanarayan*, I. L. R. 1947) Mad. 126].

An order under this rule has to be passed by the court after carefully considering the facts and the interest of the minor; the order should show that the court had applied its mind to the question whether the compromise was or was not for the benefit of the minor. [*Chittan Singh v. Sahib Dayal*, 1950 A. L. J. 63].

The language of rule 7 of Order 32 is not susceptible of a presumption being raised in favour of an agreement or compromise entered into on behalf of a minor without an order of the Court. On the contrary, it is mandatory in terms and requires the guardian or next friend of the minor to obtain leave of the Court for entering into a compromise, and such permission must appear expressly in the proceedings of the Court. When there was neither an application seeking leave of the Court to enter into a compromise nor was an express order passed by the Court to that effect, the compromise must be held as wholly illegal and ineffectual. (*Chhangu v. Dukhi*, A. I. R. 1967 All. 273).

Where a next friend or guardian *ad litem* of a minor enters into a compromise on his behalf with the permission of the Court under O. 32, r. 7, the compromise and the decree based thereon would be as much binding on the minor as it is on the adult parties, unless the minor can show that the next friend or his guardian *ad litem* was guilty of fraud or negligence. The onus of proving fraud or negligence on the part of the next friend or guardian *ad litem* would be upon the minor and for this purpose he has to make clear and distinct allegations in his pleadings and to substantiate them. (*Sant Bhushan Lal v. Brij Bhushan Lal*, A. I. R. 1967 Delhi 137).

(2) A next friend or guardian for the suit shall not, without the leave of the court, receive any money or other movable property on behalf of a minor either by way of compromise before decree or order, or under a decree or order in favour of the minor. (O. 32, r. 6). But there is nothing in this rule to prevent the father or the *karta* of a Hindu family to receive money before or after the decree on behalf of the minor unless the father or *karta* is appointed guardian *ad litem* of the minor in the suit.

When minor attains majority.—When the minor plaintiff attains majority, he may elect to proceed with the suit or application or elect to abandon it. If he elects the former course, he shall apply for an order discharging the next friend and for leave to proceed in his own name. The title of the suit will be corrected so as to read henceforth thus—

“A. B ; late a minor, by C. D., his next friend, but now having attained majority.”

Where he elects to abandon the suit or application, he shall, if a sole plaintiff, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or which may have been paid by his next friend. Where the minor applies to the court that the suit instituted in his name by his next friend be dismissed on the ground that it was unreasonable or improper and the court is satisfied of such unreasonableness or impropriety, it may grant the application and order the next friend to pay the costs of all parties in respect of the application and the suit or make such other order as it thinks fit. (O. 32, rr. 12 and 14).

Persons of unsound mind.—All the above rules, except r. 2 A, equally extend to persons adjudged to be of unsound mind or who, though not so adjudged, are on inquiry, found by the court, by reason of mental infirmity incapable of protecting their interests when suing or being sued (O. 32, r. 15).

Lunatics are under the special protection of the court and the decree will not be effective even if by ignorance of the court no enquiry was made. A person who is not of unsound mind may yet be “mentally infirm” within

the meaning of O. 32, r. 15, C. P. C. if by reason of a physical ailment, such as paralysis, he has been rendered so weak and helpless that his mental outfit is by no means the outfit of a normal and healthy man. (*Ram Lal v. Laxmi*, A. I. R. 1940 Ajmer, 48).

The purpose and the scope of the inquiry under O. 32, r. 15, Civil Procedure Code, is very much limited, the purpose being to give proper representation to the plaintiff who is a minor or insane at the time of suing. The scope of inquiry has to be only limited for the procedural purpose, that is to say, to give proper representation to the plaintiff if he is found to be insane or minor on the date when the suit was instituted. The inquiry is not expected to travel beyond this limited purpose. It must be remembered that any order passed under O. 32, r. 15 does not finally decide as to whether the plaintiff was insane at the time when the transactions attacked in the suit were entered into by him. That is a matter which has to be gone into like any other issue in a regular trial and will have to be ultimately decided in the suit itself. Where the question which arises in the main suit itself is the same, greater care is required to be taken to see that any order passed under O. 32, r. 15 does not transgress its legitimate limits and thus allowed to affect the main question involved in the suit.

There is no reasonable basis for the apprehension that the evidence recorded for the purpose of disposing of the application under O. 32, r. 15 would be used in the regular suit. In order to determine the main issue arising in the suit, the parties will have to adduce independent evidence and no reliance will be placed upon the evidence which has been recorded for a limited purpose. [*Duvvuri Papi Reddi v. Duvvuri Rami Reddi*, (1967) 2 An. W. R. 208].

A decree obtained against a person treating him as a minor while in reality he was a major at the date thereof is not a nullity, but is only an irregularity which is curable. But a decree against a minor treating him as a major is a nullity.

Where no proper guardian is appointed in a suit in which some of the defendants are minors, the whole proceedings are void. But a mere absence of formal order appointing a guardian when all necessary steps were taken will amount only to an irregularity and will not invalidate the whole proceedings.

A decree passed in favour of a minor without a next friend is only an irregularity which is deemed to be waived by the defendant if he does not apply to have the plaint taken off the file under O. 32, r. 2. The decree is consequently valid. Moreover, the law treats all acts of a minor which are for his benefit on the same footing as those of an adult. It only does not permit him to do anything which is prejudicial to his own interests.

A decree passed against a person who was a minor at the date of the institution of the suit with a properly appointed guardian *ad litem*, but attains majority during the pendency of the suit without any steps being taken to remove such guardian, with the result that the decree is passed against him as a minor, is a valid decree as the guardian *ad litem* does not automatically cease to function on the minor attaining majority, but continues to represent him throughout all proceedings unless his appointment is terminated by retirement, removal or death under rule 3 (5) of Order 32.

Appeal filed against minor without proper guardian.—Though a decree obtained against a minor without there being a guardian for him is a nullity, yet there is no authority for the proposition that an appeal filed against a minor without a proper guardian is an incompetent appeal, or a suit filed against a minor without showing a guardian for the minor is an incompetent suit. [*Laxman Karan v. Bansidhar*, 1960 A. L. J. 423].

Suits relating to matters concerning the family

Order XXX II-A

Order XXXII-A makes provision for the procedure for suits relating to matters concerning the family. (1) It lays down that the provisions of this Order shall apply to suits or proceedings relating to matters concerning the family.

(2) In particular, and without prejudice to the generality of the provisions of sub-rule (1) the provisions of this Order shall apply to the following suits or proceedings concerning the family, namely—

(a) a suit or proceeding for matrimonial relief, including a suit or proceeding for declaration as to the validity of a marriage or as to the matrimonial status of any person ;

(b) a suit or proceeding for a declaration as to the legitimacy of any person ;

(c) a suit or proceeding in relation to the guardianship of the person or the custody of any minor or other member of the family, under a disability;

(d) a suit or proceeding for maintenance ;

(e) a suit or proceeding as to the validity or effect of an adoption ;

(f) a suit or proceeding, instituted by a member of the family, relating to wills, intestacy and succession;

(g) a suit or proceeding relating to any other matter concerning the family in respect of which the parties are subject to their personal law.

(3) So much of this Order as relates to a matter provided for by a special law in respect of any suit or proceeding shall not apply to that suit or proceeding. [O. 32-A, r. 1].

Proceedings to be held in camera.—In every suit or proceeding to which this Order applies, the proceedings may be held *in camera* if the Court so desires and shall be so held if either party so desires. [O. 32-A, r. 2]

(1) In every suit or proceeding to which this Order applies, an endeavour shall be made by the Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.

(2) If, in any such suit or proceeding, at any stage it appears to the Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement.

3) The power conferred by sub-rule (2) shall be in addition to, and not in derogation of, any other power of the Court to adjourn the proceedings. (O.) 32-A, r. 3)

Assistance of welfare expert.—In every suit or proceeding to which this Order applies, it shall be open to the Court to secure the services of such person (preferably a woman where available) whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the Court may think fit, for the purpose of assisting the Court in discharging the functions imposed by rule 3 of this Order. (O. 32-A, r. 4).

Duty to enquire into facts.—In every suit or proceeding to which this Order applies, it shall be the duty of the court to inquire, so far it reasonably can, into the facts alleged by the plaintiff and into any facts alleged by the defendant. (O. 32-A, r. 5).

Meaning of family.—For the purposes of this Order, each of the following shall be treated as constituting a family, namely :—

(a) (i) a man and his wife living together, (ii) any child or children, being issue of theirs, or of such man or such wife, (iii) any child or children being maintained by such man and wife ;

(b) a man not having a wife or not living together with his wife, any child or children, being issue of his, and any child or children being maintained by him ;

(c) a woman not having a husband or not living together with her husband, any child or children being issue of hers, and any child or children being maintained by her ;

(d) a man or woman and his or her brother, sister, ancestor or lineal descendant living with him or her ; and

(e) any combination of one or more of the groups specified in cl. (a), cl. (b), cl. (c) or cl. (d) of this rule. [O. 32 A, r. 6].

Explanation : For the avoidance of doubts, it is hereby declared that the provisions of r. 6 shall be without any prejudice to the concept of 'family' in any personal law or in any other law for the time being in force.

SUITS BY INDIGENT PERSONS

[Order XXXIII]

Suit may be instituted by indigent persons.—Subject to the following provisions any suit may be instituted by an indigent person. (O. 33, r. 1).

Who is an indigent person.—A person is an indigent person (1) when he is not possessed of sufficient means (other than property exempt from attachment in execution of a decree and the subject-matter of the suit) to enable him to pay the fee prescribed by law for the plaint in the suit proposed to be instituted by him, or (2) where no such fee is prescribed, when he is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree, and the subject-matter of the suit. (O. 33, r. 1, Expln. I).

Any property which is acquired by a person after the presentation of his application for permission to sue as an indigent person, and before the decision of the application, shall be taken into account in considering the question whether or not the applicant is an indigent person. (O. 33, r. 1, Expln. II).

Where the plaintiff sues in a representative capacity, the question whether he is an indigent person shall be determined with reference to the means possessed by him in such capacity. (O. 33, Expln. III).

Every inquiry into the question whether or not a person is an indigent person shall be made, in the first instance, by the chief ministerial officer of the court, unless the court otherwise directs, and the court may adopt the report of such officer as its own finding or may itself make an inquiry into the question. (O. 33, r. 1A).

The word 'means' certainly covers all realisable assets within a person's reach, but it is doubtful whether a right to enjoy a particular property for life by which the person entitled to enjoy the same has to eke out his livelihood from the income of such property can be considered means even if an offer is made to advance funds on such right. It cannot be equated with the equity of redemption available to a mortgagor which certainly is an asset. The right to enjoy the property is not normally a saleable or encumberable interest, though persons interested might offer to purchase or take a mortgage, not necessarily to help the vendor or mortgagor, but to place the allottee in embarrassing circumstances. [*Rani Anmal v. Rathinasabapathi Mudaliar*, A. I. R. 1967 Mad. 494].

A person to be entitled to sue as an indigent person has to obtain permission to sue as such by the court. The application for permission must contain the particulars required in regard to plaints and a schedule of the property; movable and immovable, belonging to the applicant, with the estimated value thereof, and it should be signed and verified as if it were a plaint. The application should be presented to the court by the applicant in person, unless he is exempted from appearing in court in which case the application may be presented by an authorised agent, who can answer all material questions relating to the application; provided that where there are more plaintiffs than one, it shall be sufficient if the application is presented by one of the plaintiffs. The applicant or his agent may then be examined by the court regarding the merits of the claim and the property of the applicant. (O. 33, rr. 2-4).

Rejection of application. -The court shall reject an application for permission to sue as an indigent persons—

(a) where it is not properly framed and presented in the manner prescribed by rules 2 and 3, i. e., full particulars as detailed above are not given or where the application is not presented by the proper person; or

(b) where the applicant is not an indigent person; or

(c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as an indigent person; or

(d) where his allegations do not show a cause of action; or

(e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter;

(f) where the allegations made by the applicant in the application show that the suit would be barred by any law for the time being in force, or

(g) where any other person has entered into an agreement with him to finance the litigation. (O. 33, r. 5).

This rule is intended to be exhaustive.

An application to sue as a indigent person composite document consisting of an unstamped plaint and an application for permission to sue in *forma pauperis*. If the application for permission to sue in *forma pauperis* is rejected, the plaint still remains and the court may, in its discretion, allow the petitioner to pay the court fee and in such a case the suit shall be deemed to have been instituted on the date of presentation of the application. After rejection of the leave, the court should consider whether the petitioner plaintiff should be given time for payment of court fee and pass appropriate orders. (*H. Venkatramamurthi v. H. Kameswaramma*, A.I.R. 1966 Andh. Pra. 278).

Procedure.—When the court sees no reason to reject the application on any of the grounds stated above, it shall fix a day after notice to the opposite party and the Government pleader for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof. The court examines the witnesses produced by either party, and the applicant or his agent, makes a full record of their evidence and hears arguments and after such hearing may allow or refuse to allow the applicant to sue as an indigent person. Where the application is granted it is numbered and registered and deemed the plaint in the suit. The suit then proceeds in the ordinary manner except that the plaintiff is not liable to pay any court-fee, other than fees payable for service of process. (O. 33, rr. 6-8).

The High Court was labouring under a mistake when it said that the enquiry into the question whether the respondent was an indigent person was exclusively a matter between him and the State Government and that the appellant was not interested in establishing that the respondent was not an indigent person. Order 33, r. 6, provides that if the Court does not reject the application under r. 5, the Court shall fix a day of which at least 10 days' notice shall be given to the opposite party and the Government pleader for receiving such evidence as the applicant may adduce in proof of pauperism and for hearing *any evidence in disproof thereof*. Under O. 33, r. 9, it is open to the Court on the application of the defendant to dispauper the plaintiff on the grounds specified therein, one of them being that his means are such that he ought not to continue to sue as an indigent person. An immunity from a litigation unless the requisite court fee is paid by the plaintiff is a valuable right for the defendant. And does it not follow as a corollary that the proceedings to establish that the applicant-plaintiff is an indigent person, which will take away that immunity, is a proceeding in which the defendant is vitally interested? To what purpose does O. 33, r. 6, confer the right on the opposite party to participate in the enquiry into the pauperism and adduce evidence to establish that the applicant is an indigent person, unless the opposite party is interested in the question and entitled to avail himself of all the normal procedure to establish it. [*M. L. Sethi v. R. L. Kapur*, (1973) II S. C. J., 543, 547].

Where a person, who is permitted to sue as an indigent person, is not represented by a pleader, the court may, if the circumstances of the case so require, assign a pleader to him. (O. 33, r. 9A).

Where the plaintiff succeeds in the suit, the court shall calculate the amount of court-fees which would have been paid by the plaintiff if he had

not been premitted to sue as a pauper, and such amount shall be recoverable by the State Government from any party ordered by the decree to pay the same, and shall be a first charge on subject-matter of the suit. (O. 33, r. 10).

A suit by an indigent person or a person claiming to be an indigent person must be regarded as instituted on the date of the presentation of the application for permission to sue *in forma pauperis* as required by rr. 2 and 3 of O. 33, C. P. C. When permission to sue as an indigent person is granted by the Court under O. 33, r. 7, the petition or application must be regarded as a plaint filed on the day when the application was presented to the Court.

An application to sue *in forma pauperis* is but a method prescribed by the Code for institution of a suit by an indigent person without payment of fee prescribed by the Court-Fees Act. If the claim made by the applicant that he is an indigent person is not established the application may fail. But there is nothing personal in such an application. The suit commences from the moment an application for permission to sue *in forma pauperis* as required by O. 33 of the Code of Civil Procedure is presented, and O. 1, r. 10, of the Code of Civil Procedure would be as much applicable in such a suit as in a suit in which court-fee had been duly paid. (*Vijay Pratap Singh v. Dukh Haran Nath Singh*, A. I. R. 1962 S. C. 941).

There is nothing in O. 33, C. P. C. which prevents an applicant from telling the Court that although he had prayed for permission to sue *in forma pauperis*, he is now in possession of funds and would like to pay the court-fee on the application treating it as a plaint. Thereby, in effect, the applicant withdraws his prayer for permission to sue as an indigent person and requests the Court not to apply the provisions of O. 33 to him. If the court agrees, and, generally in practice the Court does agree, to treat the application as a plaint, in view of the fact that it contains all the necessary particulars required in a plaint, there would be no objection to the suit being treated as one instituted by the presentation of a plaint. By acceptance of the court-fee by the Court, the document, namely, the plaint, would, by virtue of S. 149, C. P. C., have the same force and effect as if such fee had been paid in the first instance, viz., on the date it was presented to the Court. [*Jugal Kishore v. Dhanoo Devi* (1975) I. S. C. J. 464.]

Where the plaintiff fails in the suit or is dispaupered, or where the suit is withdrawn or dismissed for default on failure of the plaintiff to pay the postal charges chargeable for the service of the defendant, the court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person. (O. 33, r. 11).

Remedies in case of refusal of leave to file in forma pauperis.—When in an application made to file a suit in *forma pauperis* leave is refused to allow the suit to be filed in *forma pauperis* and when subsequently the court fee is not paid within the time given for payment and the application made to file the suit in *forma pauperis* is finally rejected or dismissed, the final orders passed would amount to rejection of the plaint and the remedy of the applicant against such an order is not by way of revision but by way of appeal, such an order being a 'decree' within the meaning of S. 2 (2) of the Code of Civil Procedure. The earlier order passed refusing permission to sue in *forma pauperis* merges in such a decree and after passing of the final orders rejecting or dis-

missing the an indigent person application for *pauperism* the remedy for questioning the correctness of the order of the court refusing permission to file the suit in *forma pauperis* is only to prefer an appeal against the final order passed rejecting or dismissing the application and not to file a revision against the earlier order passed refusing permission to file the suit in *forma pauperis*, though such a revision lies before the application is finally rejected or dismissed. (*Beerav Alli, Desireddi v. Yeluri Rama Rao*, A. I. R. 1972 Andhra Pradesh 55).

Dispaupering.—The court, may, on the application of the defendant, or of the Government pleader, of which seven days clear notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

(1) if he is guilty of vexatious or improper conduct in the course of the suit ;

(2) if it appears that his means are such that he ought not to continue to sue as an indigent person ; or

(3) if he has entered into any agreement, with reference to the subject-matter of the suit under which any other person has obtained an interest in such subject-matter. (O. 33, r. 9).

Its effects.—Such an order shall bar a fresh application of a like nature by him in respect of the same right to sue ; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the State Government and by the opposite party in opposing the application for leave to sue as an indigent person.

Abatement.—The right to sue in *forma pauperis* being a *personal* one the application to sue as an indigent person abates on the death of the applicant and his legal representatives cannot be brought on the record and the application continued. On such abatement the court shall order the amount of court-fees which would have been paid by the plaintiff, if he had not been permitted to sue as an indigent person, to be recoverable by the State Government from the estate of the deceased plaintiff. The remedy of the legal representative, therefore, is to file a fresh application to sue in *forma pauperis*, or to institute a suit on paying court-fees.

The privilege of maintaining a suit in *forma pauperis* is a personal privilege granted to a plaintiff who has no means of carrying on or continuing the litigation. If the plaintiff who is an indigent person dies pending the suit, his legal representative is not entitled to continue the suit in *forma pauperis* unless he himself is an indigent person and has obtained leave to continue in that capacity. [*Jato Singh v. Mt. Malti Kuer*, A. I. R. 1947 Pat 474].

A application for leave to sue in *forma pauperis* is a composite document consisting of an unstamped plaint and an application for permission to sue as an indigent person. If the application is rejected, the plaint still remains and the court may, in its discretion, while rejecting the application, allow the applicant to pay the requisite court-fee on the plaint, and in that case the plaint shall be deemed to have been instituted on the date of presentation of the original application. [*Mt. Jinatum Nisa Bibi v. Mt. Idra'un Nisa*, A. I. R. 1950 Orissa 183].

Rejection of application.—As provided under O. 33, R. 15 an order refusing to allow an applicant to sue as an indigent person could be a bar only to any subsequent application of the like nature by him in respect of the same

right to sue, but the applicant would be at liberty to institute a suit in the ordinary manner in respect of such right, provided that the plaint shall be rejected if he does not pay, either at the time of institution of the suit or within such time thereafter as the court may allow, the costs, if any, incurred by the State Government and by the opposite party in opposing his application for leave to use as an indigent person. Therefore, the idea is that even if the applicant fails untimely in his application filed to sue as an indigent person by the dismissal of the application, he is not prevented from instituting a suit in the ordinary manner in respect of the same right. This he cannot if the dismissal of his application to sue as an indigent person finally does not amount merely to rejection of the plaint but amounts to only dismissal of the suit for default because there is an essential distinction between rejection of a plaint and dismissal of a suit. The rejection of a plaint takes away the basis of the suit. It amounts to that no suit was filed. But in the case of a dismissal, even for default, the existence of the suit is recognised and its termination is indicated, in which case the applicant is no longer within his right to institute a suit even in the ordinary manner in respect of the same right. Therefore, when any application for pauperism is finally disposed of after refusing leave to the applicant to sue *in forma pauperis*, it amounts to rejection of the plaint and not dismissal of the suit for default. (*Berrav Alli Deisreddi v. Yeluri Rama Rao*, A. I. R. 1972 Andhra Pradesh, 55).

Grant of time for payment of court-fee.—Nothing contained in r. 5, r. 7 or r. 15 shall prevent a court, while rejecting an application under r. 5, or refusing an application under r. 7, from granting time to the applicant to pay the requisite court-fee within such time as may be fixed by the court or extended by it from time to time ; and upon such payment and on payment of the costs referred to in r. 15 within that time, the suit shall be deemed to have been instituted on the date on which the application for permission to sue as an indigent person was presented. [O.33, r. 15-A].

The costs of an application for permission to sue as an indigent person and of an inquiry into pauperism shall be costs in the suit. (O. 33, r. 16).

Any defendant, who desires to plead a set-off or counter-claim, may be allowed to set up such claim as an indigent person, and the rules contained in O. 33 shall, so far as may be, apply to him as if he were a plaintiff and his written statement were a plaint. (O. 33, r. 17).

APPEALS BY INDIGENT PERSONS

The topic has been discussed at the relevant place in Part VII under the heading "Appeals".

SUITS RELATING TO MORTGAGES OF IMMOVABLE PROPERTY

[Order XXXIV]

Parties to suits for foreclosure, sale and redemption.—All persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage ; but a puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit ; and a prior mortgagee need not be jointed in a suit

to redeem a subsequent mortgage. (O. 34, r. 1). The object of this rule is that all claims affecting the equity of redemption may be disposed of in one and the same suit.

A co-mortgagor is a necessary party to a redemption suit, but a plea of his non-joinder, if not specifically raised in the written statement or at the trial, cannot be raised for the first time in appeal, when it is not established that he has a subsisting interest. [*Sahab Jan Mian v. Jahuri Thakur*, 1954 B. L. J. R. 61].

A person having paramount title is not a necessary party in a mortgage suit and need not be impleaded. But where persons setting up adverse title of the mortgagor are impleaded without objection and an issue is framed as regards their rights for decision on the merits and the issue is decided, it cannot be said that the court either went beyond its jurisdiction or did anything which was so improper or illegal that the court of appeal must, even in the absence of any prejudice, interfere. The rule is more a rule of convenience and prudence than a rule affecting the jurisdiction of the court. [*Satwati v. Kali Shanker*, 1954 A. L. J. 645].

Foreclosure suit : Preliminary Decree.—In a suit for *foreclosure*, if the plaintiff succeeds, the court shall pass a preliminary decree (a) ordering that an account be taken of what was due to the defendant at the date of such decree for principal and interest on the mortgage, the costs of the suit awarded to him and other costs, charges and expenses properly incurred by him, (b) declaring the amount so due at that date and (c) directing that, if the defendant pays into court the amount so found, or declared due on a date fixed by the court within six months from the date on which such amount is declared, the plaintiff shall deliver up to the defendant all documents in his possession or power relating to the mortgaged property, and shall, if required, retransfer the property to the defendant at his (defendant's) cost free from the mortgage and from all incumbrances created by the plaintiff. If the payment is not made on or before the date so fixed, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all right to redeem the property. (O. 34, r. 2).

Final decree.—Where the payment is made by the defendant on or before the date so fixed, the court shall, on application made by the defendant, pass a final decree ordering the plaintiff to deliver up the documents referred to in the preliminary decree and, if necessary, ordering him to retransfer at the cost of the defendant the mortgaged property and also, if necessary, ordering him to put the defendant in possession of the property. Where the payment has not been made by the defendant on or before the date so fixed the court shall, on application by the plaintiff, pass a final decree, declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property. On the passing of a final decree all liabilities of the defendant in respect of the mortgage shall be discharged. (O. 34, r. 3).

Suit for Sale : Preliminary Decree.—In a suit for *sale* if the plaintiff succeeds, the court shall pass a preliminary decree ordering that an account be taken of what was due to the plaintiff at the date of the said decree, declaring the amount so due at that date and directing that if the amount found due is paid on or before the date mentioned in the decree, the property be retransferred back to the mortgagor and that if the amount is not paid the

property be sold. If the amount is not paid as directed the plaintiff is at liberty to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale, after deduction therefrom of the expenses of the sale, be paid into court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff. (O. 34, r. 4).

Final decree.--Where on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree the defendant makes payment into court of all amounts due from him, the court shall, on application made by the defendant, pass a final decree or, if such decree has been passed, an order ordering the plaintiff to deliver up the documents referred to in the preliminary decree and, if necessary, ordering him to transfer the mortgaged property and, also, if necessary, ordering him to put the defendant in possession of the property. Where, however, payment has not been made, the court shall, on application made by the plaintiff, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold. Where the net proceeds of any sale are found insufficient to pay the amount due to the plaintiff the court, on application by him, may, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance. (O. 34, rr. 5 and 6).

Redemption suit : Preliminary decree.--In a suit for *redemption* if the plaintiff succeeds, the court shall pass a preliminary decree ordering that an account be taken of what was due to the defendant at the date of such decree for principal and interest on the mortgage, the costs of the suit, if any, awarded to him and other costs properly incurred by him in respect of his mortgage security together with interest, declaring the amount so due at that date and directing that, if the plaintiff pays into court the amount so found due on or before such date as the court may fix within six months from the date the amount is declared in court, the defendant shall deliver up to the plaintiff all documents in his possession relating to the mortgaged property and shall, if so required, retransfer the property to the plaintiff at his cost free from the mortgage and from all incumbrances created by the defendant and that if payment of the amount found due under the preliminary decree is not made on or before the date so fixed, the defendant shall be entitled to apply for a final decree that the mortgaged property be sold or that the plaintiff be debarred from all right to redeem the property, depending upon the nature of the mortgage. (O. 34, r. 7).

Final decree.--Where before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree the plaintiff makes payment into court of the money due, the court shall, on application made by the plaintiff, pass a final decree or, if such decree has been passed, an order ordering the defendant to deliver up the documents and, if necessary, ordering him to retransfer at the cost of the plaintiff the mortgaged property and, also, if necessary, ordering him to put the plaintiff in possession of the property. Where, however, the payment has not been made, the court shall, on application made by the defendant, pass a final decree in the case of a mortgage by conditional sale or anomalous mortgage declaring that the plaintiff is debarred from all right to redeem the mortgaged property and in the case of any other mortgage, not being a usufructuary mortgage, that the mortgaged property be sold and the proceeds of the sale be paid into court.

and applied in payment of what is found due to the defendant. (O. 34, r. 8).

Sale of property subject to prior mortgage.—Where any property the sale of which is directed is subject to a prior mortgage, the court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold. (O. 34, r. 12).

Application of proceeds.—Such proceeds shall be brought into court and applied as follows : first, in payment of all expenses incident to the sale ; secondly, in payment of the amount due to the prior mortgagee on account of the prior mortgage ; thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed ; fourthly, in payment of the principal money due on account of the mortgage ; and lastly, the residue, if any, shall be paid to the persons proving themselves to be interested in the property sold according to their respective interests therein or upon their joint receipt. (O. 34, r. 13).

Suit for sale of mortgaged property.—Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage. (O. 34, r. 14).

Summary Procedure ORDER XXXVII

Courts and classes of suits to which the Order is to apply.—The rules regarding summary procedure shall apply to the following courts, namely (a) High Courts, city civil courts and courts of small causes ; and (b) other courts. In respect of the courts referred to in cl. (b), however, the High Court may, by notification in the official Gazette, restrict the operation of this Order only to such categories of suits as it deems proper and may also from time to time by subsequent notification in the official Gazette further restrict, enlarge or vary, the categories of suits to be brought under the operation of O. 37 as it deems proper. (O. 37, r. 1).

Subject to the provisions of sub-r. (1), the Order applies to the following classes of suits, namely. (a) suits upon bills of exchange, hundies and promissory notes ; (b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,—(i) on a written contract ; or (ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty ; or (iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only. (O. 32, r. 2).

Institution of summary suits.—A suit, to which O. 37 applies, may if the plaintiff desires to proceed hereunder, be instituted by presenting a plaint which shall contain, (a) a specific averment to the effect that the suit is filed under this order, *i. e.*, Order 37 ; (b) that no relief, which does not fall within the ambit of this rule, has been claimed in the plaint ; and (c) the following inscription, immediately below the number of the suit in the title of the suit, namely :—

“(Under O. XXXVII of the Code of Civil Procedure, 1908)”.

The summons of the suit shall be in Form No. 4 in Appendix B or in such other form as may, from time to time, be prescribed.

The defendant shall not defend the suit unless he enters an appearance and in default of his entering an appearance the allegation in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum, not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, up to the date of the decree and such sum for costs as may be determined by the High Court from time to time by rules made in that behalf and such decree may be executed forthwith. [O. 37, r. 2].

Procedure for the appearance of the defendant.—In a suit to which O. 37 applies, the plaintiff shall, together with the summons serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in court an address for service of notices on him. If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4-A in Appendix B or such other form as may be prescribed from time to time, returnable not less than ten days from the date of service, supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit. The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the court to be just. Leave to defend shall not be refused unless the court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious.

Where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in court.

At the hearing of such summons for judgment,—

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith ; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the court or judge may direct him to give such security and within such time as may be fixed by the court or Judge and that, on failure to give such security within the time specified by the court or judge or to carry out such other directions as may have been given by the court or Judge, the plaintiff shall be entitled to judgment forthwith. The court or judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit. (O. 37, r. 3).

After decree the court may, under special circumstances, set aside the decree, and, if necessary, stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit. (O. 37, r. 4).

PART V
SPECIAL PROCEEDINGS

[Ss. 89-93 and Order XXXVI]

ARBITRATION [S. 89] [Annulled]

SPECIAL CASE

90. Power to state case for opinion of Court.—Where any persons agree in writing to state a case for the opinion of the Court, then the Court shall try and determine the same in the manner prescribed.

There are certain suits which are called friendly suits. The parties do not institute a suit by presenting a plaint in such cases, but they, claiming to be interested in the decision of any question of fact or law, enter into an agreement in writing stating such question in the form of a case for the opinion of the court, and providing that, upon the finding of the court with respect to such question, (a) a sum of money, fixed by the parties or to be determined by the court, shall be paid by one of the parties to the other of them ; or (b) some property, movable or immovable, specified in the agreement, shall be delivered by one of the parties to the other of them, or (c) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

Every case stated must be divided into consecutively numbered paragraphs, stating such facts and specifying such documents as may be necessary for the court to decide the question raised thereby. (O. 36, r. 1).

Where the agreement is for the delivery of any property, or for the doing, or the refraining from doing any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement. (O. 36, r. 2).

The agreement with an application is then filed in the court which would have jurisdiction to entertain a suit of the amount or value of the subject-matter involved in the agreement. The application is numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others of them as defendant or defendants and notice is given to all the parties to the agreement, other than the party or parties by whom the application was presented. (O. 36, r. 3).

The case is then set down for hearing as a suit in the ordinary manner, and where the court is satisfied, after examination of the parties, or after taking such evidence as it thinks fit, that the agreement was duly executed by them, that they have a *bona fide* interest in the question stated therein, and that the same is fit to be decided, it proceeds to pronounce judgment thereon as in an ordinary suit, and upon the judgment so pronounced a decree follows. (O. 36, r. 5).

No appeal shall lie from a decree passed under r. 5. (O. 36, r. 6).

The relevant provisions governing a special case are embodied in S. 90 and Order 36, which have been discussed above. For the applicability of the rules contained in Order 36, the filing of a proper agreement with an application is a condition pre-requisite. Merely stating the question of law for the opinion of the court, but without an agreement by the parties to pay money or deliver property consequent on the finding of the court, is not compliance of the provisions of S. 90 or Order 36, r. 2.

Order 14, rules 6 and 7 also refer to cases where parties to a suit by agreement state the question of fact or of law in the form of an issue and further enter into an agreement in writing that, upon the finding of the court in the affirmative or the negative of such issue, (a) a sum of money specified in the agreement or to be ascertained by the court shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement ; (b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them ; or (c) one party shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute. The court, after being satisfied that the agreement was duly executed by the parties, that they have a substantial interest in the decision of such question and that the same is fit to be tried and decided, proceeds to try the issue, states its finding and pronounces judgment, upon which a decree follows.

Suits relating to Public Matters

91. Public nuisances and other wrongful acts affecting the public.—(1) In the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted—

(a) by the Advocate-General, or

(b) with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

Section 91 (1) of the Code prior to its amendment by the Amendment Act, 1976, authorised the Advocate-General or two or more persons having obtained his consent in writing to institute a suit. The provision with regard to the obtaining of the Advocate-General's consent has now been modified by the provisions of S. 91 (1) discussed above.

Procedural Provision.—This section is a procedural provision. It does not purport to create any new right, nor does it purport to deprive anybody of a right derived from the general law of the land. Consequently it does not control representative suits under O. 1, r. 8 (discussed in detail earlier at pages 80 and 81 ante, Part I) or modify the right of a person to sue apart from the provisions of this section. Thus a representative suit brought not on behalf of

the public of a place but of one particular community forming part of it, *i. e.*, for declaration of its right to take out a possession along a particular route and for removal of certain obstructions did not even earlier require previous consent of the Advocate-General or the leave of the court.

Meaning of Public Nuisance.—The term “public nuisance” occurring in S. 91 has not been defined in the Code of Civil Procedure. It is an act which interferes with the enjoyment of a right which all members of the community are entitled to, such as the right to fresh air, to travel on the highways, etc. (Osborn). In view of the provisions of S. 3 (44) of the General Clauses Act, the definition of “public nuisance” as given in S. 268 of the Indian Penal Code will apply to the present Code. It says: “A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.” The consensus of judicial opinion has, in recent years, veered round the view that the English rule that the plaintiffs cannot maintain a suit in respect of an obstruction to a highway unless they prove special damage to themselves personally in addition to the general inconvenience to the public is not applicable in India.

Special Damages.—A suit seeking relief in respect of public nuisance is maintainable although sanction of the Advocate-General as it obtained prior to the Amendment Act, 1976, or the leave of the court, had not been obtained as required by S. 91, C. P. C., if the plaintiff proved special damage. Special damage is that damage which by reason of a nuisance would be suffered by some individual beyond what is suffered by him in common with other persons affected by that nuisance. [*Khair Singh v. Brij Lal*, I. L. R. (1949) Nag. 94].

92. Public Charities.—(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the leave of the Court, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

- (a) removing any trustee ;
- (b) appointing a new trustee ;
- (c) vesting any property in a trustee ;

(cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property ;

(d) directing accounts and inquiries ;

(e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust ;

(f) authorising the whole or any part of the property to be let, sold, mortgaged or exchanged ;

(g) settling a scheme ; or

(h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863, or by any corresponding law in force in the territories which, immediately before the 1st November, 1956, were comprised in Part B States, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

(3) The Court may alter the original purposes of an express or constructive trust created for public purposes of a charitable or religious nature and allow the property or income of such trust or any portion thereof to be applied *cy pres* in one or more of the following circumstances, namely :—

(a) where the original purposes of the trust, in whole or in part,—

(i) have been, as far as may be, fulfilled ; or

(ii) cannot be carried out at all, or cannot be carried out according to the directions given in the instrument creating the trust or, where there is no such instrument, according to the spirit of the trust ; or

(b) where the original purposes of the trust provide a use for a part only of the property available by virtue of the trust ; or

(c) where the property available by virtue of the trust and other property applicable for similar purposes can be more effectively used in conjunction with, and to that end can suitably be made applicable to any other purpose, regard being had to the spirit of the trust and its applicability to common purposes ; or

(d) where the original purposes, in whole or in part, were laid down by reference to an area which then was, but has since ceased to be, a unit for such purposes ; or

(e) where the original purposes, in whole or in part, have, since they were laid down,—

(i) been adequately provided for by other means, or

(ii) ceased, as being useless or harmful to the community, or

(iii) ceased to be, in law, charitable, or

(iv) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust.

Object of the section.—The object of the section in requiring the Advocate-General to institute a suit, or permission of the court before suits are instituted, is to protect public interests and the interests of the institution, on the one hand, and to discourage impecunious and improper persons indulging in vexatious and improper suits against trustees, on the other.

The main purpose of S. 92 (1) is to give protection to public trusts of a charitable or religious nature from being subjected to harassment by suits being filed against them. That is why it provides that suits under that section can only be filed either by the Advocate-General or two or more persons having an interest in the trust with the leave of the court. The object is that before the Advocate-General files a suit or the leave of the court is granted to two or more persons, the Advocate-General or the court would satisfy himself or itself that there is a *prima facie* case either of the breach of trust or of the necessity for obtaining directions of the court. (*Chairman Madappa v. Mahanthadevaru*, A. I. R. 1966 S. C. 78).

Application of the section.—Section 92 is a complete Code by itself in respect of suits based upon an alleged breach of any express or constructive trust, created for public purposes of a charitable or religious nature. In order to attract the application of the section the following four conditions are necessary, viz., (1) there must be a trust, express or constructive, for public purposes of a charitable or religious nature ; (2) the plaint must allege a breach of trust or necessity for direction as to administration of the trust ; (3) the suit must be in the interests of the public, i. e., it must be brought in a representative capacity for the benefit of the public and not to enforce individual rights, and (4) the relief claimed should be one of the reliefs set out in the section.

To invoke S. 92 of the Code of Civil Procedure, three conditions have to be satisfied, namely, (i) the trust is created for public purposes of a charitable or religious nature ; (ii) there was a breach of trust or a direction of the Court is necessary in the administration of such a trust ; and (iii) the relief claimed is one or other of the reliefs enumerated therein. If any of the three conditions is not satisfied, the suit falls outside the scope of the said section. [*Bishwanath v. Sri Thakur Radha Ballabhji*, A. I. R. 1967 S. C. 1044].

Prior to the amendment of S. 92 by the Amendment Act, 1976, the provisions of the section authorised the Advocate-General, or two or more persons having an interest in the express or constructive trust created for public purposes of a charitable or religious nature, to institute a suit in the case of any alleged breach of such trust, but the new sub-section (1) permits, besides the Advocate-General, any two or more persons having an interest in the trust and having obtained the leave of the Court, to institute a suit to obtain a decree in respect of the matters specified therein.

Further, a new sub-section (3), inserted by the Amendment Act, 1976 empowers the court to alter the original purposes of an express or constructive trust created for public purposes of a charitable or religious nature and to allow the property or income of such trust or any portion thereof to be applied *cy pres* in one or more of the following circumstances, namely :—

(a) where the original purposes of the trust, in whole or in part,—(i) have been, as far as may be, fulfilled ; or (ii) cannot be carried out at all, or cannot be carried out according to the directions given in the instrument creating the trust ;

(b) where the original purposes of the trust provide a use for a part only of the property available by virtue of the trust ; or

(c) where the property available by virtue of the trust and other property applicable for similar purposes can be more effectively used in conjunction with, and to that end can suitably be made applicable to any other purpose, regard being had to the spirit of the trust and its applicability to common purposes ; or

(d) where the original purposes, in whole or in part, were laid down by reference to an area which then was, but has since ceased to be, a unit for such purposes ; or

(e) where the original purposes, in whole or in part, have, since they were laid down,—(i) been adequately provided for by other means, or (ii) ceased, as being useless or harmful to the community, or (iii) ceased to be, in law, charitable, or (iv) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust.

The U. P. Public Charitable and Hindu Religious Institutions and Endowments Ordinance, 1976, repealed the applicability of Ss. 92 and 93 of the Code of Civil Procedure to charitable institutions and Hindu religious institutions and the endowments thereof to which the Ordinance applies. Notwithstanding such repeal, however, all rules made, proceedings taken and other things done by any authority or officer under the repealed Act shall be deemed to have been made, taken, or done by the appropriate authority or officer under the corresponding provisions of the Ordinance and shall have effect accordingly, until they are modified, cancelled or superseded under the provisions of the Ordinance.

Distinction between private and public trust.—Section 92 relates to those charities only in which the public are interested. The endowment must be for a public purpose of a charitable nature and the beneficial interest must be

vested in the public in general or a considerable section thereof. The distinction between a private and public trust is that whereas in the former the beneficiaries are specific individuals, in the latter they are the general public or a class thereof. While in the former the beneficiaries are persons who are ascertained or capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment. When there is a deed of endowment, the decision whether the trust is public or private must turn on the construction of the deed, aided by such considerations as are admissible in law. But where there is no deed regard must be had to repute, usage of the subject-matter concerned and other circumstances. The word 'trust' is used in S. 92, not in any technical sense and would include Hindu or Muhammadan religious endowment. (*Nallamotu Sivaramabrahman v. Vanipurapu Satyanarayana*, A. I. R. 1967 Andh. Pra. 181).

Where removal of the trustees for misconduct or breach of trust is alleged the test which must be applied is whether the acts or omissions complained of disclose conditions which render intervention necessary in order to save the trust property. Errors of judgment or miscarriage of discretion have to be disregarded unless they be sufficiently chronic. There must be want of fidelity or dishonest and corrupt motives or deliberate or wilful neglect or deliberate misfeasance. (*Managing Committee of Syed Salar Endowment, Bahraich v. Mohamed Ahsan*, 21 Luck. 222).

The "two persons" referred to in S. 92 of the Code are two individuals and the fact that the two persons were father and son and members of a joint Hindu family would not convert them into one person for the purpose of that section.

Interest to maintain suit.—Section 92 of the Code gives the right of suit only to persons interested and does not give the right of suit only to those who have some direct interest, e. g., those who are connected with the management or who have some special interest greater than that of others who have interest in the trust, but at the same time it restricts the right of suit so that only those who have a real interest in the present and not merely a sentimental interest in future like that of a mere co-religionist could file a suit. The object of the provision is to protect those who are in charge of public trust from being harassed by litigation at the instance of busy bodies who have no real or personal interest in the trust. The words "interest in the trust" mean some such interest which is affected by mismanagement so that the person is interested in having the affairs of the trust set right by court. (*Farman Ali Khan v. Mohd. Raza Khan*, 1949 A. L. J., 453). The word 'interest' in S. 92, C. P. C., connotes a genuine and real concern to see that the trust is properly administered for the purposes for which it is intended. (*Krishna Chetty v. Krishna Rao*, 1954 M. W. N. J. 65).

Abatement.—When one of the two plaintiffs in a suit under S. 92 dies, no question of abatement would arise even if others are not impleaded in his place and it is open to the remaining plaintiff to continue the suit. If all the plaintiffs who obtained the sanction die after the valid institution of the suit, members of the public interested in the trust can get themselves impleaded in the case and prosecute it. (*Abdul Sattar Sait v. Moidu*, I. L. R. 1952 T. C. 781).

It has been held by the Supreme Court that a suit filed in a representative capacity does not abate on the death of one of the plaintiffs: *Charan Singh v. Darshan Singh*, [1975 (II) S. C. J., 164].

Relief not asked against some trustees.—Where in a suit filed under the provisions of S. 92, C. P. C., the plaintiffs do not ask for any relief against some of the defendants the court cannot pass any decree as against those defendants. (*Shaikh Abdul Kayum v. Mulla Alibhai*, A. I. R. 1963 Supreme Court, 309).

Judgment in rem.—A judgment in a suit under S. 92 has conclusive effect as against the entire world, either as a *judgment in rem* or, in the alternative, by treating the whole world as a party to the suit. (*Anjuman Islamia v. Latafat Ali*, 1950 A. L. J. 776). A suit under S. 92, C. P. C., can be maintained only in respect of a public trust of a permanent character and the judgment in such a suit would be a *judgment in rem* and not a *judgment in personam*. If nobody raises any objection in a suit with regard to the public or permanent nature of the trust, then after the decision given by the District Judge holding the property to be a public trust and laying down a scheme for its administration it is not open to any party to challenge the permanent nature of the trust. (*The Sunni Central Board of Waqf v. Sirajul Haq Khan*, 1953 A. L. J. 587).

Dispute as to title to temple property.—In a suit for the settlement of the scheme for the management of a temple it is not appropriate for the court to investigate questions of title to property about which there is dispute. (*Sree Kalimata Chakurani of Katighat v. Jiban lhan Mukerjee*, A. I. R. 1962 S. C. 1323).

93. Exercise of powers of Advocate-General outside Presidency-Towns.—The powers conferred by Ss. 91 and 92 on the Advocate-General may, outside the presidency-towns, be, with the previous sanction of the State Government, exercised also by the Collector or by such officer as the State Government may appoint in this behalf.

Under this section sanction of the local Government must precede the consent of the Collector or such officer as the State Government may appoint. The previous sanction of the local Government has to be obtained for every suit. The local Government must give its consent to each particular suit. (*Swami Satyananda Brahmachari v. Phani Lal Mookerji*, A. I. R. 1955 Cal. 155).

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PART VI

SUPPLEMENTAL PROCEEDINGS

(Ss. 94-95, O. XXXVIII, O. XXXIX and O. XL)

94. Supplemental Proceedings.—In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,—

(a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison ;

(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property ;

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold ;

(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property ;

(e) make such other interlocutory orders as may appear to the Court to be just and convenient.

Proceedings for appointment of a receiver are supplemental and interlocutory in nature and a suit only for the appointment of a receiver would not be maintainable.

Temporary injunction pending application to sue in *forma pauperis*.—An order for a temporary injunction cannot be made in the course of proceedings relating to an application for permission to sue in *forma pauperis* which has not yet been registered as a suit. The order for temporary injunction is possible if there is a suit and till permission is granted to sue as a pauper it cannot be said that there is a suit pending between the parties. (*Thimmayya v. Sadasivappa*, I. L. R. 1952 Mys. 354).

Injunction against court.—A court cannot issue an injunction against another court which is not subordinate to it. Hence one court cannot order stay of execution proceedings in another court. Such an order cannot be passed under the inherent powers. (*Harbhagat Kaur v. Kirpal Singh*, A. I. R. 1951 Pepsu, 78).

ARREST AND ATTACHMENT BEFORE JUDGMENT

(ORDER XXXVIII)

Arrest before Judgment.—Where at any stage of a suit, excepting suits respecting any immovable property as referred to in S. 16, clauses (a) to (d), the court is satisfied, by affidavit or otherwise,—

(a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the court or to obstruct or delay the execution of any decree that may be passed against him,—

(i) has absconded or left the local limits of the jurisdiction of the court, or

(ii) is about to abscond or leave the local limits of the jurisdiction of the court, or

(iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof, or

(b) that the defendant is about to leave India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance.

The defendant shall not, however, be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim. (O. 38, r. 1).

Security—Where the defendant fails to show such cause the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit. (O. 38, r. 2).

Where the defendant fails to deposit in court money or other property sufficient to answer the claim against him or to furnish security for his appearance, the court may commit him to the civil prison until the decision of the suit, or where a decree is passed against the defendant, until the decree has been satisfied.

No person shall be detained in prison for a longer period than six months if the amount or value of the subject-matter exceeds Rs. 50/—, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed Rs. 50/—. (O. 38, r. 4).

Attachment before Judgment.—Where, at any stage of a suit, the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him.—

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court,

the court may direct the defendant, within a fixed time, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security. [O. 38, r. 5 (1)]. If an order of attachment is made without complying with the provisions of sub-r. (1) of r. 5, such attachment shall be void. [O. 38, r. 5 (4)]. Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, the court may order the attachment of the property as may be sufficient to satisfy the decree. Where, however, the

defendant shows such cause or furnishes the required security, the court shall order the attachment to be withdrawn, if the property has already been attached. (O. 38, r. 6). The attachment order shall also be withdrawn if the suit is dismissed. [O. 38, r. 9].

The remedy of an attachment before judgment is an extraordinary remedy and should be granted with the utmost care and caution. (*Ratan Kumar Poddar v. The Howrah Motor Co. Pvt. Ltd.*, A. I. R. 1975 Cal. 180).

Private alienation of property after attachment void.—Section 64 lays down that where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment shall be void as against all claims enforceable under the attachment. The attachment, however, merely prevents and avoids private alienation and confers no right on the attaching creditor. It does not invalidate a judicial sale in execution of another decree. Again, a private transfer pending the attachment would be void only as against all claims enforceable under the particular attachment and no other. (*Ambi v. Kelan*, I. L. R. 1937 Mad. 970).

Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree. [O. 38, r. 10].

Attachment of property is a serious proceeding and courts ought to be careful not to lend themselves as tools of oppression.

✓ TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS [Order XXXIX] 39.

Meaning of temporary injunction.—A temporary injunction is an order by which a party to an action is required to do, or refrain from doing, a particular thing until the suit is disposed of or until further orders of the court. A temporary injunction is *interim* in nature, granted on an interlocutory application of the plaintiff.

Cases where granted.—The granting of a temporary injunction is a matter of discretion of the court, the discretion is to be exercised judicially and according to well-settled principles.

✓ Rule 1 of Order 39 of the Code provides that where in any suit it is proved by affidavit or otherwise—

➤ (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

➤ (b) that the defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors,

(c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the court may, by order, grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession.

sion of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the court thinks fit, until the disposal of the suit or until further orders.

As said above, the power to grant a temporary injunction is discretionary with the court. That discretion has to be judicially exercised on certain legal principles. The temporary injunction should not be lightly granted, because it will be a serious thing if persons in possession were to be restrained from using the property merely because a suit has been instituted with reference to it. The court has to be satisfied with regard to the following matters :

1. The court will first see that there is a *bona fide* contention between the parties, and then on which side, in the event of success, will lie the balance of inconvenience if the injunction does not issue.

2. The court must be satisfied that the applicant has a *prima facie* case to go to trial, i. e., there is a probability of the plaintiff getting the relief asked for by him. It is not necessary that the plaintiff should establish his title to the property in suit. It is enough for him to show that he has a fair question to raise as to the existence of the right which he alleges and can satisfy the court that the property in dispute should be preserved in its present actual condition until such question can be disposed of.

3. The court may be satisfied that there is a likelihood of the plaintiff suffering from an irreparable injury—an injury which could not be adequately remedied by damages—if the injunction is not granted.

4. Where a permanent injunction cannot be given, generally no temporary injunction is allowed.

To sum up, before granting a temporary injunction, the court must be satisfied that the plaintiff has a *prima facie* case ; that the court's interference is necessary to protect him from irreparable or at least serious injury ; that the balance of convenience is in favour of the person who asks for the injunction ; and that there is no other sufficient or adequate remedy open to him by which to protect himself. Even if the plaintiff has a *prima facie* case, if it has not been shown that an irreparable loss would be caused and the plaintiff cannot be compensated in damages, no case is made out for the grant of a temporary injunction. (*Mooraj Mal v. Administrator, Ajmer Municipal Committee*, 1953 A. M. L. J. 91).

The court has to consider on *prima facie* grounds the existence of the legal rights alleged and the respective strength and weakness of the cases of the parties. (*Rameshwar Pratap Singh v. Md. Ayyub*, A. I. R. 1960 Pat. 327).

Before the issue of a temporary injunction, the court must satisfy itself that the plaintiff has a *prima facie* case. To sustain an application for temporary injunction a probability of right is sufficient. But, if the legal right which is alleged to have been infringed is doubtful, the mere existence of the doubt is enough to refuse temporary injunction. The party seeking the aid of the court for an injunction must show that the act complained of is in violation of his right or is at least an act which if carried into effect, will necessarily result in a violation of the right. (*Mathew Philips v. P. O. Koshy*, A. I. R. 1960 Mys. 74).

In determining whether the plaintiff is entitled to an interim injunction the Court will have to apply its mind whether the plaintiff has a *prima facie* case and whether the balance of convenience is in his favour. In that connection, the fact that a Court has granted a decree directing the defendant to be put back in possession is a relevant circumstance. (*Chunni and another v. Sullahar and another*, A. I. R. 1972 Allahabad 418).

It is settled law that temporary injunction can only be granted if the plaintiff is able to prove not only that he has a *prima facie* case, but also that the balance of convenience lies in favour of granting the injunction and the irreparable injury would be caused to him, if it is not granted. After the trial, however, the plaintiff becomes entitled to grant of permanent injunction merely on proof of his title to immovable property over which the defendant threatens to commit a trespass. (*Shayak Mohammad v. Iqbal Ahmed*, A. I. R. 1973 Rajasthan, 115).

The subordinate courts have no inherent jurisdiction to grant a temporary injunction *ex debito justitiae*. When the case cannot be brought within the four corners of O. 39, which expressly deals with injunctions, the inherent jurisdiction of the court cannot ordinarily be invoked to add to the powers thus conferred.

That the suit would become infructuous if the court did not issue an injunction is by itself no ground in law, if there was no *prima facie* case made out in support of it. A *prima facie* case for the grant of a temporary injunction means that there is a substantial question which needs investigation. In order to make out a *prima facie* case, it is enough if the plaintiff can show that he has a fair question to raise as to the extent of the right alleged by him. (*Gwalior Dairy Ltd. v. State*, M. B. L. J. 1955 H. C. R. 1586).

In a suit for mere declaration no *ad interim* injunction can be passed. If the plaintiff is in possession of the property and is exercising complete control over it, even if the sales are effected by some persons who have no rights, his right can in no way be affected; and in case he is not in possession, then he should have filed a suit for possession also. (*Mohammad Ibrahim Khan v. Maharaja Sri Pateshwari Prasad Singh*, 1960 A. L. J. 97).

The errors contemplated by cl. (c) of S. 115 may relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision and not to errors of fact or of law, after the prescribed formalities had been complied with. It is a well-established principle of law that the court does not grant injunction under O. 39, r. 1, C. P. C., in cases where the damage or loss can be assessed in terms of money. Where the impugned order of the lower appellate court is contrary to this well-established principle of law, it has been held that it was an order with material irregularity. (*The Bihar State Electricity Board v. Jawahar Lal*, A. I. R. 1976 Pat. 323).

Injunction to restrain repetition or continuance of breach.—The court may, at any stage of a suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed or not, on the application of the plaintiff, grant a temporary injunction restraining the defendant from committing the breach of contract or injury complained of. [O. 39, r. 2 (1)].

Temporary injunction under O. 39, r. 2 of the Civil Procedure Code can be granted on the term of the prayer for permanent injunction in the suit and not on different terms. Where the plaintiff did not pray for a permanent injunction restraining the defendant from suspending or removing him from his office and prayed only for restraining the defendant from interfering with his day-to-day working as principal, it was held that the temporary injunction restraining the defendant from suspending or removing him was not an injunction of the same or like kind but of a different kind. If such injunction is granted the court granting it acts with material irregularity. (*V. D. Tripathi and others v. Vijai Shanker Dwivedi and others*, A. I. R. 1976 Alld. p. 97, Lucknow Bench).

An injunction directed to a corporation is binding on all members and officers of the corporation besides the corporation itself. (O. 39, r. 5).

Notice.—Notice of the application for injunction shall be issued by the court in all cases to the opposite party except where the object of granting the injunction would be defeated by the delay.

Where, however, it is proposed to grant an injunction without giving notice of the application to the opposite party, the court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay, and require the applicant—

(a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with—

- (i) a copy of the affidavit filed in support of the application ;
- (ii) a copy of the plaint ; and
- (iii) copies of documents on which the applicant relies, and

(b) to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent. [O. 39, r. 3].

Where an injunction has been granted without giving notice to the opposite party, the Court shall make an endeavour to finally dispose of the application within thirty days from the date on which the injunction was granted ; and where it is unable so to do, it shall record its reasons for such inability. [O. 39, r. 3-A].

Inherent jurisdiction to issue temporary injunction.—The courts have inherent jurisdiction to issue temporary injunctions in circumstances which are not covered by the provisions of Order 39, C. P. C., if the court is of opinion that the interests of justice require the issue of such interim injunction. (*Manohar Lal Chopra v. Seth Hiralal*, A. I. R. 1962 S. C. 527 : 1963 A. L. J. 169).

It was observed by their Lordships of the Supreme Court in the above case that it is well-settled that the provisions of the Code are not exhaustive, for the simple reason that the legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of the expression "if it is so

prescribed" in S. 94 is only this that when the rules in O. 39, Civil Procedure Code, prescribe the circumstances in which the temporary injunction can be issued, ordinarily the Court is not to use its inherent powers to make the necessary orders in the interests of justice but is merely to see whether the circumstances of the case bring it within the prescribed rule. If the provisions of S. 94 were not there in the Code, the Court could still issue temporary injunctions, but it could do that in the exercise of its inherent jurisdiction. No party has a right to insist on the Court's exercising that jurisdiction and the Court exercises its inherent jurisdiction only when it considers it absolutely necessary for the ends of justice to do so. It is in the incidence of the exercise of the power of the Court to issue temporary injunction that the provisions of S. 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power.

Section 151, C. P. C., itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it. Further, when the Code itself recognizes the existence of the inherent power of the Court, there is no question of implying any powers outside the limits of the Code.

Thus there being no such expression in S. 94 which expressly prohibits the issue of a temporary injunction in circumstances not covered by O. 39 or by any rules made under the Code, the courts have inherent jurisdiction to issue temporary injunctions in circumstances which are not covered by the provisions of O. 39, C. P. C., if the court is of opinion that the interests of justice require the issue of such interim injunction.

Consequence of disobedience or breach of injunction.—In the case of disobedience of any injunction granted or other order made under rule 1 or rule 2 or breach of any of the terms on which the injunction was granted or the order made, the Court granting the injunction or making the order, or any Court to which the suit or proceeding is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Court directs his release.

(2) No attachment made under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the proceeds, the Court may award such compensation as it thinks fit to the injured party and shall pay the balance, if any, to the party entitled thereto. [O. 39, r. 2A].

Temporary Injunction in favour of defendant.—From the language of rule 2 of Order 39 it is plain beyond controversy that a temporary injunction can be asked for by and granted only to the plaintiff and this contention is also supported by *Kangabam Birmangol Singh v. Laimayum Ningol Aribam Ongbi Madhabi Devi*, [A. I. R. 1962 Manipur 55]. It was contended that a temporary injunction could not be granted in favour of the defendant under S. 151, Code of Civil Procedure, also. This contention must be rejected as untenable in view of the Supreme Court decision in the case of *Manohar Lal*

Chopra v. Rai Bahadur Rao Raja Seth Hira Lal, (A. I. R. 1962 S. C. 527). In this case the Supreme Court held that the courts possess power to grant temporary injunction in a given case not strictly covered by Order 39 with a view to do justice to the parties. The question still remains whether temporary injunction could be granted by the trial court in favour of the defendant in exercise of inherent powers under S. 151, Code of Civil Procedure. Such injunction can be granted by a court in suitable cases under its inherent powers for the ends of justice in favour of the defendant and against the plaintiff as held by the Supreme Court in *Manohar Lal Chopra's* case. If a temporary injunction can be granted under S. 151 in favour of the plaintiff, there appears to be no reason why in suitable cases temporary injunction cannot be granted by the Court under its inherent powers in favour of the defendant also; and there is no substance in the agreement that this relief could be obtained by the defendant only by filing a regular suit for permanent injunction against the plaintiff. [*Dilip Kumar v. Ch. Ram Saran Vakil*, 1972 A. L. J. (Lucknow) p. 379].

The case *Collison v. Warren*, [(1901) 1 Ch. 812] cited in the English Annual Practice is also very instructive in this connection. Buckley, J. posed with this question at the initial stage as to whether the defendant can move for an injunction against the plaintiff without filing a counter claim or issuing a writ in a cross action and answered the same in the light of earlier authorities by saying that "in some cases and only in some cases he can, viz., where his claim to relief arose out of the plaintiff's causes of action or was incidental to it." Similar view was expressed in the case of : *Rattu v. Mala*, (A. I. R. 1968 Rajasthan 212).

In circumstances which are of an exceptional nature the courts can interfere in favour of the defendant for the ends of justice and issue an injunction on the defendant's motion restraining the plaintiff if the defendant's claim to such relief appears to arise out of plaintiff's cause of action or was incidental to it for otherwise it would be patently unjust to drive the defendant to a separate litigation and thereby to take upon himself, the burden of some additional expenditure if the relief for temporary injunction arises out of plaintiff's cause of action in the suit pending against him or is incidental thereto.

Termination of Injunction.—An injunction granted *pendente lite* ends with the suit. An interlocutory injunction in a suit for perpetual injunction is dissolved *ipso facto* by the decree granting a perpetual injunction; in case of refusal it is discharged.

Effect of private alienation after the issue of temporary injunction.—The effect of a temporary injunction is not to make a subsequent alienation of the property void. Any mortgage or sale of property by a party in contravention of an injunction is not illegal and void. The only penalty that the person disobeying the order of injunction incurs is that prescribed by rule 2-A of Order 39, namely that the court granting an injunction may order the other property of the person guilty of such disobedience or breach to be attached and sold for awarding out of the sale proceeds compensation to the party on whose application the injunction was granted and he may also be detained in the civil prison for a term not exceeding six months.

Order for injunction may be discharged, varied or set aside.—An order for an injunction may be discharged, or varied, or set aside by the court on application made therein by any party dissatisfied with such order :

Provided that if in an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless for reasons to be recorded, it considers that it is not necessary so to do in the interest of justice :

Provided further that where an order of injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless, the Court is satisfied that the order has caused undue hardship to that party. [O. 39, r. 4].

95. Compensation for obtaining arrest, attachment or injunction on insufficient grounds.—(1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted, under the last preceding section,—

(a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or

(b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same,

the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury (including injury to reputation) caused to him :

Provided that a Court shall not award, under this section an amount exceeding the limits of its pecuniary jurisdiction.

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction.

Where attachment before judgment is obtained on insufficient grounds, the court can award general damages for mental injury. The word "expense or injury" in S. 95, C. P. C., would cover damage to credit and reputation of the defendant. (*Padamsingh v. Chhotekhan*, M. B. L. J. 1254 H. C. R. 1230). Where the order for injunction was obtained on the basis of incorrect representation, it must be held that the injunction was applied for on insufficient grounds, and general damages can be awarded on account of injury to prestige and humiliation and special damage need not be proved. (*Srinivasaraghavan v. Sudaraj*, A. I. R. 1955 Mad. 552).

An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction.

It may also be mentioned that if the defendant wants to claim a larger sum by way of compensation than is permissible under S. 95, he has to bring a regular suit against the plaintiff and not take recourse to the proceedings for compensation as provided in this section.

Appeal.—An appeal lies from an order granting compensation but not a second appeal. An order, however, passed by a court of small causes under S. 95 is not appealable.

INTERLOCUTORY ORDERS

Interlocutory orders are orders passed by a court during the pendency of a suit, which do not determine the substantive rights of the parties in respect of the subject-matter of the suit or terminate the suit, but relate to the protection or otherwise of the subject-matter of the suit. They are also passed in the course of execution proceedings after the judgment has been obtained. In short, they relate to matters of procedure as they arise either during the trial of the suit or in the course of execution proceedings. They are passed to assist the parties in the prosecution of their case, or for the purpose of protecting the subject-matter of the suit, or for ensuring the determination of the merits of the case.

Rules 6 to 10 of Order 39 mention certain interlocutory orders. The court has the power to order interim sale of movable property, which is the subject-matter of the suit, or is attached before judgment in such suit, which is subject to speedy and natural decay. [O. 39, r. 6]. It can order for the detention, preservation or inspection of any property which is the subject-matter of such suit; it can authorise any person for the aforesaid purposes to enter upon or into any land or building in the possession of any other party to such suit, or authorise any samples to be taken or observation to be made or experiment to be tried for obtaining full information of evidence. (O. 39, r. 7). An application by the plaintiff for an order under r. 6 or r. 7 may be made at any time after institution of the suit. An application by the defendant for a like order may be made at any time after appearance. Before making an order under r. 6 or r. 7 on an application made for the purpose, the court shall, except where it appears that the object of making such order would be defeated by the delay, direct notice thereof to be given to the opposite party. (O. 39, r. 8). When the land in suit is liable to Government revenue or is a tenure liable to sale and the party in possession neglects to pay the revenue or rent, the court may order any other party to the suit in case of an order of sale of the land to be put in immediate possession of the property. (O. 39, r. 9). Where the subject-matter of the suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or thing as a trustee for another party, or that it belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such last-named party. (O. 39, r. 10). Orders directing the appointment of a receiver also fall within the meaning of interlocutory orders.

APPOINTMENT OF RECEIVER

[Order XL]

Appointment.—Where it appears to the court to be just and convenient, the court may, by order, appoint a receiver of any property whether before or after decree, remove any person from the possession or custody of the property; and commit the same to the possession, custody or management of the

receiver. (O. 40, r. 1). The appointment of a receiver is in the discretion of the court. That discretion has to be exercised not arbitrarily but cautiously, judicially and according to legal principles after a consideration of the circumstances of the case. The main object and purpose of his appointment is the preservation of the subject-matter of the litigation pending a judicial determination of the rights of the parties thereto. He is appointed for the protection of rights of the parties or for the prevention of injury. The court should not appoint a receiver of property in the possession of the defendant claiming the same by legal title, unless the plaintiff can show *prima facie* that he has a strong case and a good title to the property. He must have an interest in the property to be affected by the order.

In the matter of appointment of receiver of the property in dispute before it, the court has a wide discretion. But it will not appoint a receiver unless from the materials brought to its notice it is satisfied that it is just and convenient to do so. Different considerations will arise in different cases; but in a case of disputed title where the plaintiff seeks recovery of possession, the court will appoint a receiver if it is satisfied on two matters: (1) that the title which the plaintiff has set up is *prima facie* good; and (2) that the property is in danger of being wasted or dissipated or being so dealt with as to get irretrievably out of the reach of the plaintiff who is *prima facie* entitled to its possession. (*Bokaro v. State of Bihar*, A. I. R. 1966 Pat. 154).

A receiver should be appointed not only where it is necessary for the realization, preservation or better custody or management of any property, movable or immovable, the subject of a suit or attachment, but also where it appears to the court to be just and convenient. But the *bona fide* possessor of the property should not be disturbed by the appointment of a receiver unless some substantial ground for such interference has been made out and there is well-founded fear that the property will be dissipated unless the court gives its protection.

A receiver should not be appointed merely because no harm would be done by such appointment. Nor should he be appointed because the relationship between the parties is strained. He should also not be appointed where no risk of loss is made out.

Satisfaction of Court for appointment of receiver is only necessary.—The words of O. 40, r. 1, make it abundantly clear that the court would be justified in appointing a receiver where it is satisfied that it would be 'just and convenient'. It cannot, therefore, be said that it is only in the case where there is an application by the plaintiff for the relief that a receiver could be appointed. The words 'appoint a receiver of any property' are also significant. The fact that in a partition action, the defendant asking for appointment of a receiver only claims the properties to be his own separate property and resists the suit of the plaintiff for partition and does not claim any relief, would not matter so long as the court is convinced that it would be just and convenient to appoint a receiver for the protection of the interests of the parties. The rule is intended to safeguard the interest of the parties pending final disposal of the suit. (*Vankataswami v. Kotayya*, A. I. R. 1962 Andhra Pradesh, 14).

Limitation on the court's power.—The court's power to appoint a receiver is limited to the case where the proceedings are still pending before it. It has no power to direct the appointment or the continuance of a receiver to hold charge of property after the litigation has been determined,

and the property has ceased to be the subject-matter of litigation. (*Muhammad Ali Khan v. Ahmad Ali Khan*, I. L. R. 1945 All. 818).

Selection of Receiver.—A party to a litigation should not, in the absence of exceptional circumstances, be appointed a receiver. He should be an impartial person, wholly disinterested in the subject-matter of the suit.

Powers of Receiver.—Being a servant of the court, a receiver has only such power and authority as is conferred on him by the court. His powers are entirely conditioned by the term of his appointment, which may be varied by the court subsequently. The court may confer upon him all such powers, mentioned in Order 40, r. 1 (1) (d), viz., as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the court thinks fit.

Under O. 40, r. 1, a receiver is an officer or representative of the court and he functions under its directions. The court may, for the purpose of enabling the receiver to take possession and administer the property, by order remove any person from the possession or custody of the property. Further, when a person is a party to the suit, the court can direct the receiver to remove him from the possession of the property even if the plaintiff has not a present right to remove him.

Thus where the appellant was a party to the suit and the court, through the receiver, took possession of certain mills and thereafter the receiver, during the course of the administration of the property, under compromise arrangement for running the mills, leased out one of the mills to the appellant with an express condition that the appellant should redeliver the property to the receiver on the expiry of the lease and the term of the lease had expired, it was held that the court was legally competent to confer a power on the receiver under Order 40, r. 1 (1) (d) to recover the property from the appellant. It was further held that this was a simple case of a court in the course of its administration of the estate through the agency of a receiver making a suitable provision for the running of the mills. As the agreed term had expired, the court could certainly direct the appellant to put the mill in the possession of the receiver, and no question of deciding the conflicting claims of a lessee and a third party arose in the case. (*Hiralal Patni v. Loonkaran Sethiya*, A. I. R. 1962 Supreme Court, 21.).

When a receiver is appointed under O. 40, r. 1, to the property is in *custodia legis*. The receiver is an officer or representative of the Court. His possession is possession of the Court through receiver and when he is appointed to receive rent and profits of immovable property, the tenant becomes virtually the tenant of the Court and the Court becomes his landlord. Therefore the receiver is competent to bring a suit for ejectment against the tenant on the authority of Court's permission. (*Ram Saran Das v. Smt. Shanti Devi*, A. I. R. 1977 Allahabad 175).

Duties.—The duties of a receiver are enumerated in rule 3 of Order 40. That rule provides—

Every receiver so appointed shall—

(i) furnish such security (if any) as the court thinks fit, duly to account for what he shall receive in respect of the property ;

(ii) submit his accounts at such periods and in such form as the court directs ;

(iii) pay the amount due from him as the court directs , and

(iv) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

He is expected to keep his accounts and vouchers ready for examination at any time.

It is not always necessary that a receiver should take immediate possession of the estate but his general duty is not discharged by not taking possession of the subject-matter of the dispute for a long time after his appointment and by not doing all acts of ownership, despite the Court's directions.

The mere fact that an application for setting aside the appointment of the receiver is made by a party to the dispute is no ground for his not taking steps for recovery of the properties. Even when a party is asserting his title and exclusive interest without bringing an action in law and without having obtained the leave of the Court, he will be enjoined to make over possession of the movables, regardless however clear his right may be. It is not open to any party to question by disobedience the orders of the Court or the appointment of the receiver. While the orders exist, they must be obeyed and it ought, on all occasions, to be inflexibly maintained. If a party is prejudiced by the appointment, he can only apply to the Court for setting it aside. As such the receiver cannot say, for his failure to take possession, that the parties are claiming exclusive interest in some of the properties. The fact of party's possession does not give him the privilege to interfere with the receiver.

The first duty of the receiver is to collect the assets. If a party in possession refuses to deliver it, the receiver may proceed against him or can act according to the directions of the Court.

The purpose of receivership is to preserve the fund of the estate but not to retain it for his personal use. Even if such fund is in his hand for a short period, its proper investment is essential. The receiver will, therefore, be personally liable for every loss resulting from his acting without or beyond his appointment. The receiver cannot be allowed to make profits out of the property he handles. The fund is always regarded as fund in custody of the Court and as such it is always his duty to let the Court know its actual condition.

Though the receiver has discretion, it is not the limit of the expenditure and he is amenable to the Court's judgment as to the necessity of such expenditure. The correctness of an expenditure must appear from something more than the statement made by him in his report.

The receiver's duty is not finished and is not limited only to collection of amounts actually made. He is responsible both for sums actually received and for those which might have been received by him but for his wilful neglect and default. For this, he will be surcharged on his accounts. When it is found that the receiver has made a loss to the estate by breach of his duty, he has to make good such loss. But such loss must be traced to his neglect. It cannot also be said that it is not his duty to find out the liabilities

of the estate and this should be avoided unless the law compels that conclusion.

It is essential that he is absolutely free from any influence of the parties and nothing should be done which might lend a colour or to any suggestion that he is concerned with the interest of any particular party or with any matter other than the preservation and protection of the property as a whole. He should maintain the rule that the guidance is to be sought only from the Court and not from any party.

The receiver does not enjoy a wider measure of protection than is given to other accounting persons in a fiduciary position. (*Praful'a Ranjan Sarkar v. Saroj Ranjan Sarkar*, 71 Cal. W. N. 548).

Liability of Receiver.—A receiver is personally liable for breach of contract for which sanction of the court has not been obtained. (*Ramnarayan Satyapal v. Carey and Daniel*, 58 C. 174).

Enforcement of Receiver's Duties.—Where a receiver fails to submit his accounts at such periods and in such form as the court directs, or fails to pay the amount due from him, as the court directs, or occasions loss to the property by his wilful default or gross negligence, the court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver. (O. 40, r. 4).

Position of Receiver.—A receiver is a servant of the court and not the legal representative or assign of the parties to the suit. He is a public officer appointed for the benefit of all concerned. He is the representative and also an officer of the court subject to its orders. His possession is the possession of the court by its receiver. He does not represent the estate, but is merely an officer of the court and, as such, cannot sue and be sued for acts done in his official capacity by a third party except with the leave of the court appointing him. A receiver appointed by the court cannot be sued without notice under S. 80 of the Civil Procedure Code. Property in the hands of a receiver cannot be attached without the leave of the court first obtained.

When a receiver is appointed in execution under S. 51, he has all the powers under Order 40, Rule 1, that is, powers of a receiver appointed in ordinary suits and proceedings other than execution proceedings.

The negative effect of the receiver appointed in execution proceedings is that the judgment-debtor is prevented from collecting amounts due from the garnishee. Any payment made by the garnishee to the judgment-debtor would not operate as a discharge but the garnishee would still continue to be liable to pay to the receiver.

Where a decree-holder is appointed as a receiver he collects the debts not as his own money. He cannot appropriate or adjust it towards the amount due from the judgment-debtor. He does not either step into the shoes of the judgment-debtor or act as a representative of the decree-holder. He acts merely as an officer of the Court. The fruits of the litigation realised by the receiver are therefore subject to the control and supervision by the Court. (*Arumugha Thevar v. Palaniammal and others*, A. I. R. 1973 Mad. 426 ; *Venkata Mallaya v. T. Ramaswami & Co.*, A. I. R. 1964 S. C. 818).

The receiver acts as an officer of the Court for the purpose of getting the fruits of the litigation into the custody of the Court, *i. e.*, *custodia legis*.

It is sufficient to extract the following observations from *Venkata Mallaya v. T. Ramaswami and Co.*, A. I. R. 1964 S. C. 818 at p. 822 to emphasise that the receiver, when once appointed, must take all the necessary steps to safeguard the interests of the judgment-debtor to file a suit to recover the entire amount due and that too before it gets barred by limitation :

“On the whole, we are disposed to take the view that, although a receiver is not the assignee or beneficial owner of the property entrusted to his care it is an incomplete and inaccurate statement of his relations to the property to say that he is merely its custodian. When a Court has taken property into its own charge and custody for the purpose of administration in accordance with the ultimate right of the parties to the litigation it is in *custodia legis*.

“The title of the property for the time being and for the purposes of the administration, may, in a sense, be said to be in the Court. The receiver is appointed for the benefit of all concerned : he is the representative of the Court, and of all parties interested in the litigation, wherein he is appointed. He is the right arm of the Court in exercising the jurisdiction invoked in such cases for administering the property ; the Court can only administer through a receiver. For this reason, all suits to collect or obtain possession of the property must be prosecuted by the receiver and the proceeds received and controlled by him alone. If the suit has to be nominally prosecuted in the name of the true owners of the property, it is an inconvenient as well as useless form—inconvenient, because in many cases the title of the owners may be the subject-matter of the litigation in which the receiver has been appointed, useless, because the true owners have no discretion as to the institution of the suit, no control over its management, and no right to the possession of the proceeds.”

The receiver is an officer of the Court. He is not the owner of the property which he takes into his possession. Where the dividend or the money has been realised by the receiver in execution of a decree on shares owned by the judgment-debtor, the receiver is holding the same for payment of his judgment-debts in the suit in which he was appointed ; but till payment out of it has been made by him, the dividend realised by him does not cease to be the property of the judgment-debtor. The money is held by the receiver for payment of the judgment-debts of the judgment-debtors, so the money is held for his benefit. [*Haridas Mundhra v. Mahabir Prasad Juthalal*, A. I. R. 1975 Cal. 257].

Proceedings instituted against a receiver without the permission of the court constitute contempt of court.

His remuneration.—A receiver's remuneration is determined by the court. (O. 40, r. 2). It represents the price of the work done by him, and must bear some relation to the labour involved and time spent in the execution of the work entrusted to him. Any agreement between the receiver and a party regarding his remuneration is gross contempt of court and void.

Duration of appointment and discharge of a receiver.—In Halsbury's Laws of England, 3rd Edn., Vol. 32 (Lord Simonds) at p. 386 under the

heading "Duration of appointment by Court" the following statement occurs :

"When a receiver is appointed for a limited time, as in the case of interim orders, his office determines on the expiration of that time without any further order of the court, and if the appointment is 'until judgment or further order' it is brought to an end by the judgment in the action. The judgment may provide for the continuance of the receiver, but this is regarded as a new appointment. If a further order of the court, though silent as to the receivership, is inconsistent with a continuance of the receiver, it may operate as a discharge.

When a receiver has been appointed on an interlocutory application without any limit of time, it is necessary to provide for the continuance of his appointment in the final judgment. The silence of the judgment does not operate as discharge of the receiver or determination of his powers. So also the appointment of a receiver generally by the judgment in an administration action need not be continued by the order on further consideration."

In Kerr on Receivers, 12th Edn. in Chapter XII under the heading "Discharge of a Receiver", the legal position is explained thus :

"The appointment of a receiver made previously to the judgment in an action will not be superseded by it, unless the receiver is appointed only until judgment or further order."

Neither S. 51 (d) nor O. 40 of the Code of Civil Procedure prescribes for the termination of the office of receivership. Their Lordships of the Supreme Court in *Hiralal Patni v. Loonkaran Sethiya*, A. I. R. 1962 Supreme Court, 21, stated the law thus :

"(1) If a receiver is appointed in a suit until judgment, the appointment is brought to an end by the judgment in the action. If a receiver is appointed in a suit, without his tenure being expressly defined, he will continue to be receiver till he is discharged. (3) But, after the final disposal of the suit as between the parties to the litigation, the receiver's functions are terminated he would still be answerable to the court as its officer till he is finally discharged. (4) The court has ample power to continue the receiver even after the final decree if the exigencies of the case so require."

Removal of receiver.—The court that appoints a receiver has also power to remove him. (*Anthony Ullysses John v. The Agra United Mills Ltd.*, 134 I. C. 445). The burden of proving circumstances to justify his dismissal rests upon the party applying for such removal or dismissal. (*Rukmani Ammal v. The Advocate-General of Madras*, 31 I.C. 908). An application to withdraw the prayer for the appointment of a receiver should not be granted as a matter of course, and the court should consider it on merits. (*Anthony Ullysses John v. The Agra United Mills Ltd.*, 1931 A. L. J. 13).

PART VII

APPEALS

(Ss. 96-112 & Orders XLI, XLIII, XLIV & XLV)

Appeals from Original Decrees

96. Appeal from original decree.—(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed *ex parte*.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognisable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed three thousand rupees.

The right to prefer an appeal from the judgment of the court of first instance is derived from the provisions of S. 96 of the Code. This is subject to the restriction contained in sub-s. (4) added by the Amendment Act, 1976. An appeal shall, however, lie on a question of law even in cases referred to in sub-s. (4) of S. 96 of the Code.

The remedy of appeal is a creation of statute and is not an inherent right of a person. If the Legislature in its wisdom thinks in a particular case that no appeal should be provided, it cannot be held that the legislation is bad. (*Ishar Das v. State of Haryana*, A. I. R. 1975 P. & H. 29).

New plea.—The general rule is that the appellant cannot be allowed to raise in his memorandum of appeal a new ground; nor can he raise in his memorandum of appeal any objection which, if it had been in the trial court, might have been cured by appropriate amendment. It is true that there are certain exceptions to this rule such as question of law, question of limitation, *res judicata*, etc., which can be substantiated on the facts already on the record. But a matter which though of law depends upon question of fact for its determination cannot be raised for the first time in appeal. [*Muhammed Abdul Razack v. Syed Meera Ummal*, (1966) 1 M. L. J. 556].

Consent decree.—A consent or compromise decree is not appealable, but on proper grounds it may be set aside by a separate suit.

No appeal will lie against an order recording a compromise when the parties settled their disputes amicably and there was no contest about the terms

of the compromise. The proper remedy for an aggrieved party is to reopen the matter in the trial court by way of review or otherwise.

The rule contained in S. 96 (3) of the Civil Procedure Code is based on the principle that a person who gives his consent to a decree being passed against him, is later on estopped from challenging the same. Therefore, once a decree is passed with the consent of parties and the decrees *ex facie* shows that both the parties had consented to it, no appeal can lie against such decree on the ground that the consent to such decree was not free and was obtained by fraud, misrepresentation, coercion, undue influence, etc.

In order to set aside a consent decree on the ground that the consent was obtained by coercion, the proper remedy is to file a separate suit and not an appeal or an application for review against that decree or an application under S. 151 or S. 152 of the Code.

If one of the parties to the litigation asserts before the appellate court that his consent to the decree was not free and it was obtained under coercion, the appellate court obviously cannot decide the dispute on the materials before it unless it allows both the parties to adduce additional evidence to prove that fact. Such a procedure is not covered by O. 41, r. 27, which is the only provision under which additional evidence is produced before the appellate court. Such evidence can be adduced properly in a separate suit for that purpose. (A. I. R. 1970 Punj 176).

Distinction between an appeal and revision.—There is an essential distinction between an appeal and a revision. An appeal is a continuation of the proceedings; in effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to the statutory limitation prescribed. But in the case of a revision, whatever powers the revisional authority may or may not have, it has not the power to review the evidence unless the statute expressly confers on it that power. [*State of Kerala v. Charia Abdulla & Co.*, (1965) 1 S. C. W. R. 680].

97. Appeal from final decree where no appeal from preliminary decree.—Where any party aggrieved by a preliminary decree, passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

The passing of final decree subsequent to the institution of the appeal against the preliminary decree will not affect the maintainability of the appeal. There is no provision in the Code making an appeal filed against the preliminary decree infructuous, if an appeal against the final decree is not filed. (*Madhao Rao Paikaji v. Eknathrao*, 194 N. L. J. 258).

DIFFERENT STAGES OF APPEAL

(Appeals from Original Decrees)

(XLI)

Form of Appeal.—Every appeal is preferred in the form of a memorandum signed by the appellant or his pleader and presented to the court or to

such officer as it appoints in this behalf. The memorandum should be accompanied by a copy of the decree appealed from and of the judgment on which it is founded. Where two or more suits have been tried together and a common judgment has been delivered therefor and two or more appeals are filed against any decree covered by that judgment, whether by the same appellant or by different appellants, the appellate court may dispense with the filing of more than one copy of the judgment. The memorandum sets forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, such grounds being numbered consecutively. Where the appeal is against a decree for payment of money, the appellant shall, within such time as the appellate court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the court may think fit. (O. 41, r. (1).

A point which has been abandoned cannot be permitted to be reagitated at a subsequent stage. (*Nagar Mahapalika, Allahabad v. Amar Pal Singh*, 1973 A. L. J. 717).

Grounds.—The appellant shall not be heard in support of any ground of objection not set forth in the memorandum of appeal, except by leave of the court; but the appellate court in deciding the appeal may consider other grounds also not set forth in the memorandum of appeal. It shall, however, not rest its decision on them unless the party affected has had a sufficient opportunity of contesting the case on those grounds. (O. 41, r. 2).

The question of *benami* is one of fact and law, more of fact than of law. Where no *benami* was pleaded in the plaint, no issue of *benami* was raised before the trial court, no oral evidence was called on the point, no ground of appeal has been taken on the point, but on the contrary the plaintiff appellant had urged just the contrary, the appellant cannot be heard to argue the question of *benami* in the appeal. (*Panchanan Pal v. Nirode Biswas*, A. I. R. 1962 Calcutta, 12).

Rejection of amendment.—The memorandum of appeal, when not properly drawn up, may be rejected or returned to the appellant for the purpose of being amended within a specified time. (O. 41, r. 3).

Application for condonation of delay.—When an appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the court that he had sufficient cause for not preferring the appeal within such period. [O. 41, r. 3-A (1)]. If the court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the court before it proceeds to deal with the appeal under r. 11 or r. 13, as the case may be. [O. 41, r. 3-A (2)]. Where an application has been made under sub-r. (1), the court shall not make an order for stay of execution of the decree against which the appeal is proposed to be filed so long as the court does not, after hearing under r. 11, decide to hear the appeal. [O. 41, r. 11 (3)].

When a memorandum of appeal is admitted, the appellate court or the proper officer of the court endorses thereon the date of presentation and registers the appeal in a book to be kept for the purpose, which is called the register of appeals. (O. 41, r. 9).

Security for costs.—The appellate court may, in its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both. The appellate court shall demand such security in cases in which the appellant is residing out of India and is not possessed of any sufficient immovable property within India other than the property to which the appeal relates. Where no such security is furnished the Court shall reject the appeal. (O. 41, r. 10).

Power to dismiss appeal without notice.—The appellate court, after fixing a day for hearing the appellant or his pleader and after hearing him accordingly, may summarily dismiss the appeal under Order 41, rule 11, C. P. C. without sending notice to the court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader. [O. 41, r. 11 (1)]. If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the court may make an order that the appeal be dismissed. [O. 41, r. 11 (2)]. The dismissal of an appeal under this rule shall be notified to the court from whose decree the appeal is preferred. Where an appellate court, not being the High Court, dismisses an appeal under sub-r. (1) it shall deliver a judgment, recording in brief its grounds for doing so, and a decree shall be drawn up in accordance with the judgment. [O. 41, r. 11 (4)]. Every appeal shall be heard under r. 11 as expeditiously as possible and endeavour shall be made to conclude such hearing within 60 days from the date on which the memorandum of appeal is filed. (O. 41, r. 11-A).

Where the appeal is not dismissed, the appellate court sends notice of the appeal to the court from whose decree the appeal is preferred and notice of the date fixed for hearing is served on the respondent or his pleader. Instead of sending the notice to the court from whose decree the appeal is preferred, the appellate court may itself cause the notice to be served on the respondent or his pleader. (O. 41, rr. 13 and 14).

Right to begin.—The case is then set down for hearing ; and on the date fixed for hearing the appellant shall be heard in support of the appeal. If the court does not dismiss the appeal at once, it shall hear the respondent against the appeal and the appellant shall be entitled to reply. (O. 41, r. 16).

Dismissal for default.—If at the date of hearing the appellant does not appear on the appeal being called on for hearing, the court may dismiss the appeal. Nothing in this sub-rule shall be construed as empowering the court to dismiss the appeal on the merits. If, however, the appellant appears and the respondent is absent, the appeal shall be heard *ex parte*. (O. 41, r. 17).

The court may also dismiss the appeal if the respondent has not been served with notice in consequence of the failure of the appellant to deposit within the period fixed, or within any subsequent period fixed where the notice is returned unserved, the necessary costs for serving the notice. (O. 41, r. 18).

Readmission of appeal.—In case of dismissal of the appeal under the above rules, the appellant may apply to the appellate court for readmission of the appeal ; and the court, if satisfied that the appellant was prevented by any sufficient cause from appearing at the time of hearing the appeal or from depositing the sum required, shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit. (O. 41, r. 19).

Re-hearing.—When an appeal is heard *ex parte* and judgment is pronounced against the respondent, the respondent may apply to the appellate court to re-hear the appeal; and if he satisfies the court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the court shall rehear the appeal on such terms as it thinks fit to impose upon him. (O. 41, r. 21).

Upon hearing, respondent may object to decree if he has preferred separate appeal.—Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal provided he has filed such objection in the appellate court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal or within such further time as the appellate court may see fit to allow. (O. 41, r. 22).

Explanation: A respondent aggrieved by a finding of the court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the court on any other finding which is sufficient for the decision of the suit, the decree is, wholly or in part, in favour of that respondent.

Cross-objections are required to be filed when there is some decree passed by the trial Judge against the respondent. Where a suit is dismissed by the trial court with an adverse finding against the defendant, and the plaintiff appeals, the appellate court cannot refuse to consider the question decided against the defendant on the ground that no cross-objections were filed by him. The defendant respondent is entitled to support in the appellate court the decree passed by the trial Judge on any of the grounds decided against him. (*Pannu Jeegania v. Dewi Prashad*, A. I. R. 1963 Madhya Pradesh 15).

Production of additional evidence.—The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court; but the appellate court may allow such evidence or document to be produced, or any witness to be examined, if

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed; or

(b) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. [O. 41, r. 27 (1)].

Wherever additional evidence is allowed to be produced by an appellate court, the court shall record the reason for its admission. [O. 41, r. 27 (2)].

O. 41, Rule 27, C. P. C. enjoins that parties in appeal have no right to produce additional evidence but empowers the appellate court to allow such evidence to be produced subject to certain conditions. However, the discretion of the appellate court is not to be exercised arbitrarily but in accordance with

the rule and subject to the conditions specified therein. A document may or may not be in the possession of the party wanting to produce it but the question before the court under r. 27 is whether he could have produced it if he had exercised due diligence or whether he was not aware of the existence of the document even after exercising due diligence. The fact that a document is not in possession of a party does not mean that he cannot produce it if he wants to do so. Further, r. 27 does not alter the rules governing admission of additional evidence. After the appellate court decides to admit any document, it must be proved in accordance with the procedure under the Evidence Act. [*Radha Devi v. Ramesh Chandra*, 1966 All. W. R. (H. C.) 634].

Under r. 27 (1), the appellate court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment", but also for "any other substantial cause". There may well be cases where even though the court finds that it is able to pronounce judgment on the state of the record as it is, and so it cannot strictly say that it requires additional evidence "to enable it to pronounce judgment", it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Such a case will be one for allowing additional evidence "for any other substantial cause" under r. 27 (1) (b) of the Code. It is easy to see that such requirement of the court to enable it to pronounce judgment or for any other substantial cause is not likely to arise ordinarily unless some inherent lacuna or defect becomes apparent on an examination of the evidence. "It may well be that the defect may be pointed out by a party, or that a party may move the court to supply the defect, but the requirement must be the requirement of the court upon its appreciation of the evidence as it stands." (*Cf. Parsotim Thakur v. Lal Mohar Thakur*, 53 Ind. App. 254).

The appellate court has discretion to receive evidence if the provisions of r. 27, O. 41, so require. This evidence cannot, however, be admitted to fill in gaps, lacuna or defect in a party's evidence. It can only be taken in evidence for requirement of the court upon its appreciation of the evidence as it stands. The words 'for any other substantial cause' in cl. (b) of r. 27, O. 41 must be read with the word 'requires' in the beginning of the sentence. The words could not be construed in the narrow sense suggested by the doctrine of *ejusdem generis*. The discretion to allow additional evidence may be exercised when in the interests of justice a point is required to be cleared up. (*Wasawa Singh Bhagat Singh v. Jagir Singh Mira Singh*, A. I. R. 1965 Punj. 494).

The object of r. 27 (2) is to keep a clear record of what weighed with the appellate court in allowing the additional evidence to be produced whether this was done on the ground (i) that the court appealed from had refused to admit evidence which ought to have been admitted, or (ii) it allowed it because it required to enable it to pronounce judgment in the appeal or (iii) it allowed this for any other substantial cause. Where a further appeal lies from the decision of the appellate court such recording of the reasons is necessary and useful also to the court of further appeal for deciding whether the discretion under the rule has been judicially exercised by the court below. The omission to record the reason must, therefore, be treated as a serious defect. Even so, the provisions is not mandatory and the omission of the High Court to record reasons for allowing additional evidence does not vitiate such admission. For it does not seem reasonable to think that the legislature intended that even though in the circumstances of a particular

case it could be definitely ascertained from the record why the appellate court allowed additional evidence and it is clear that the power was properly exercised within the limitation imposed by the first clause of the rule all that should be set at naught merely because the provision in the second clause was not complied with. It is true that the word 'shall' is used in r. 27 (2), but that by itself does not make it mandatory. (*K. Venkataramiah v. Seetharama Reddy*, A. I. R. 1963 S. C. 1526). The provision for recording reasons is merely directory and not imperative. (*Gopal Singh v. Jhakri Rai*, I. L. R. 12 Cal. 37).

Mode of taking evidence.—The additional evidence so allowed to be produced by the appellate court may either be taken by it, or the court from whose decree the appeal is preferred or any other subordinate court may be directed to take such evidence and to send it to the appellate court. (O. 41, r. 28).

Judgment when pronounced.—The appellate court, after hearing the parties or their pleaders and referring to any part of the proceeding, whether on appeal or in the court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open court either at once, or some future day of which notice shall be given to the parties or their pleaders. Where a written judgment is to be pronounced, it shall be sufficient if the points for determination, the decision thereon and the final order passed in the appeal are read out and it shall not be necessary for the court to read out the whole judgment, but a copy of the whole judgment shall be made available for the perusal of the parties or their pleaders immediately after the judgment is pronounced. (O. 41, r. 30).

The proceedings for the final decree are taken in the court which has passed the preliminary decree. So, the proceedings for the preparation of the final decree would be proceedings in the same suit and in the Court from whose decree the appeal is preferred. The appellate court can refer to them. The parties would be equally entitled to refer such proceedings at the hearing of the appeal.

The term 'proceeding' occurring in Order 41, rule 30, C. P. C. would undoubtedly include the evidence led and admitted on the record of the case. This is part of the procedure undertaken by the court in drawing up the final decree. The evidence so led being evidence on the record of the suit, could be referred to at the hearing of the appeal.

It is well settled that appeal is continuation of the suit. But it is not quite correct to say that the trial court cannot deal with the question of rights and shares of the parties after the passing of the preliminary decree, under any circumstances. It will be seen that even the trial court can, after passing the preliminary decree, reconsider the matter and pass a second preliminary decree "if an event transpires after the preliminary decree which necessitates a change in shares." The death of a party is one such event. (*Ram Kishore v. Kesho Ram*, 1972 A. L. J. 479).

Contents of Judgment.—The judgment of the appellate court shall be in writing and state (a) the points for determination; (b) the decision thereon; (c) the reasons for the decision; and (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at

the time that it is pronounced be signed and dated by the Judge or by the judges concurring therein. (O. 41, r. 31).

What judgment may direct. - The judgment may either confirm, vary or reverse the decree from which the appeal is preferred, or if the parties agree as to the form which the decree in appeal shall take, or as to the order to be made in appeal, the appellate court may pass a decree or make an order accordingly. (O. 41, r. 32).

The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such decree or order as the case may require and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees. (O. 41, r. 33).

An order may, therefore, be passed in favour of a person who has not appealed, but such an order cannot be passed against a person who is not a party to the appeal and who is not on the record.

98. Decision where appeal heard by two or more Judges.—(1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed :

Provided that where the Bench hearing the appeal is composed of two or other even number of Judges belonging to a Court consisting of more Judges than those constituting the Bench and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

(3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the letters patent of any High Court.

Where, however, there is difference of opinion on a point of law between the members of a Bench composed of two Judges, they may state the point of law upon which they differ for decision by a third or more of the other Judges

and such point shall be decided according to the opinion of the majority of the Judges who have heard the appeal, including those who first heard it.

A finding of fact recorded by the courts below cannot be interfered with when there is a difference of opinion between the Judges constituting the Bench. In such a case sub-section (2) of S. 98 will be applicable as respects that finding alone on which there is a difference of opinion and not to the result of the appeal itself when in the opinion of one Judge the lower court has misapplied the law on the facts found but the other Judge does not concur in that view. Where the opinion of the third Judge on the legal point is severable from his opinion on the finding of fact that finding becomes conclusive by the application of S. 98 (2) irrespective of the opinion recorded by the third Judge. [*Baboo Ram v. Ishrat Ali*, A. I. R. (1975), p. 180].

Dissent to be recorded.—Where the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the court shall give his dissenting judgment, with reasons for the same. (O. 41, r. 34).

99. No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.—No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder or non-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court :

Provided that nothing in this section shall apply to non-joinder of a necessary party.

Where parties do not appear to have been prejudiced in any manner by an alleged misjoinder of defendants or causes of action, the defect, if any, is completely cured by S. 99, C. P. C. [*Ram Chander Singh v. Raghunandan Ahir*, 1949 R. D. 91].

99A. No order under section 47 to be reversed or modified unless decision of the case is prejudicially affected.—Without prejudice to the generality of the provisions of S. 99, no order under S. 47 shall be reversed or substantially varied, on account of any error, defect or irregularity in any proceeding relating to such order, unless such error, defect or irregularity has prejudicially affected the decision of the case.

STAY OF PROCEEDINGS AND OF EXECUTION

[Order XLI]

Stay by appellate court.—An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree ; but the appellate court may for sufficient cause order stay of execution of such decree. [O. 41, r. 5 (1)].

Explanation.—An order by the appellate court for the stay of execution of the decree shall be effective from the date of the communication of such order to the court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution

of the decree has been made by the appellate court shall, pending the receipt from the appellate court of the order for the stay of execution or any order to the contrary, be acted upon by the court of first instance.

Stay by court which passed the decree.—Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the court which passed the decree may on sufficient cause being shown order the execution to be stayed. [O. 41, r. 5 (2)].

No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the court making it is satisfied—(a) that substantial loss may result to the party applying for stay of execution unless the order is made; (b) that the application has been made without unreasonable delay; and (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him. [O. 41, r. 5 (3)].

Notwithstanding anything contained in sub-rule (3) the court may make an *ex parte* order for stay of execution pending the hearing of the application. [O. 41, r. 5 (4)].

Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of r. 1, the court shall not make an order staying the execution of the decree. [O. 41, r. 5 (5)].

Security in case of stay.—(1) Where an order is made for the execution of a decree from which an appeal is pending, the court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the appellate court, or the appellate court may for like cause direct the court which passed the decree to take such security.

(2) Where an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the court which made the order, be stayed on such terms as to giving security or otherwise as the court thinks fit until the appeal is disposed of. [O. 41, r. 6].

The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree. [O. 41, r. 8].

Cross-objection.—Where the decree passed is partly in favour of and partly against the respondent and such decree is appealed from, the respondent can take such objection to that part of the decree which is against him as he could have taken by way of a separate appeal. Such objections are called cross-objections and are filed in the form of a memorandum.

Cross-Appeal.—In this connection it is necessary to understand the difference between cross-objection and cross-appeal. In a cross-appeal also, the decree of the lower court is partly in favour of and partly against the respondent, in which case both the appellant and the respondent may separately appeal to the higher court to set aside that part of the decree which affects him adversely. If each of them appeal we get a case of cross-appeals.

Thus, for example, where *A* sues *B* for Rs. 5,000/- and the court awards *A* a decree for only Rs. 3,000/-, both *A* and *B* are aggrieved by the decree and they are entitled to go in appeal. If *A* does not want to undergo the worry and inconvenience that continued litigation may involve, he may refrain from filing an appeal against that part of the decree which is against him, and if *B* appeals *A* may take any cross-objection to the decree which he could have taken by way of appeal.

Who can file cross-objection.—Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the court below but take any cross-objection to the decree which he could have taken by way of appeal.

When to be filed.—Cross-objections must be filed by the respondent in the appellate court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal; or within such further time as the appellate court may allow.

Service of Cross-Objection.—Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader or having received a copy thereof, the appellate court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent. (O. 41, r. 22).

Effect of withdrawal or dismissal of appeal.—Where in any case in which any respondent has under O. 41, r. 22, filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the court thinks fit.

Cross-objections between respondents.—Ordinarily the term “cross-objection” denotes that it is directed against the appellant, but it may as well be taken against another respondent when there is community of interest between the appellant and the latter. Such a cross-objection by one respondent against a co-respondent will be entertained at the discretion of the court.

General Provisions Relating to Appeals

(S. 107 & Order XLI)

Powers of the appellate court.—An appellate court has the power—

(1) to determine a case finally where the evidence on the record is sufficient ;

(2) to remand a case where the lower court has disposed of the suit upon a preliminary point and the decree is reversed in appeal ;

(3) to frame issues and refer them for trial where the lower court has omitted to frame or try any issue or to determine any question of fact, which appears to the appellate court essential to the right decision of the suit upon the merits ; and

(4) to take additional evidence or to require such evidence to be taken when the lower court has refused to admit evidence which ought to have been admitted or when the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial reason. (S. 107).

In addition to the above the appellate court has the same power and shall perform the same duties as have been conferred by the Code on courts of original jurisdiction in respect of suits instituted therein.

It is a rule of practice that when there is a conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies the appellate Court should not interfere with the finding of the trial judge on a question of fact. It would not detract from the value to be attached to a trial judge's finding of fact that the judge does not expressly base his conclusion upon the impression he gathers from the demeanour of witnesses. (*Sarju Pershad v. Jwaleshwari*, A. I. R. 1951 S. C. 120).

A contention which was not advanced before the lower court and was not even indicated in the memorandum cannot be raised for the first time in appeal, when there was also no evidence on the point. (*Travancore Forward Bank, Ltd. v. Subaraya Iyer*, A. I. R. 1954 T. C. 406).

Remand of case by the appellate court.—Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the appellate court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the court from whose decree the appeal is preferred, with directions to readmit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand. (O. 41, r. 23).

On a reading of the above rule it appears that an order of remand can be made by the appellate court only when (1) the lower court has disposed of the entire suit, (2) on a preliminary point and (3) the decision of the lower court is reversed in appeal.

An order of remand made by an appellate court would not be covered by O. 41, r. 23, C. P. C., unless the decision of the trial court on the preliminary point on which the suit is decided is reversed. (*Ramanraj v. Kripashankar*, A. I. R. 1954 Raj. 193).

Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the appellate court shall have the same powers as it has under rule 23. (O. 41, r. 23-A).

Before proceeding further it is necessary to understand the meaning of the term "preliminary point". A preliminary point is that point or issue the decision whereof in a particular way is sufficient to dispose of the whole suit. It is a point the decision of which avoids the necessity for the full hearing of the suit, e. g., issues of limitation or *res judicata*.

Disposal of a suit by trial court on one of the points involved which rendered the decision of the rest of the issues unnecessary amounts to a decision of the suit on a preliminary point and the remand comes under O. 41, r. 23, C. P. C. A preliminary point does not mean only a point of law or some technical defect in the frame of the suit. It means a point the decision of

which is sufficient to dispose of the whole suit without the necessity of deciding other points involved in the case. It may be one of fact or of law. (*Iat Kaur v. Kehar Singh*, A. I. R. 1951 Pepsu, 130).

Where the lower court decided the suit on the merits of the case, there can be no remand order by the appellate court. The suit must have been decided on a preliminary point, and it is further necessary to find that the preliminary point has been wrongly decided before a remand order can be made by the appellate court under Order 41, r. 23, C. P. C.

Under O. 41, r. 23, of the Code the power of remand given to the appellate court is limited by two conditions precedent, one being that the decree of the trial court is reversed and the second being that all questions arising in the case have not been decided by the trial court. Where one of the aforesaid two conditions precedent is absent an order of remand cannot be passed by the appellate court under O. 41, r. 23, and such an order is not appealable. (*Bishwanath Singh v. Sheikh Abdul Jabbar*, 1947 A. L. J. 518, F. B.).

Under O. 41, r. 23, C. P. C. an appellate court has got power to remand the proceedings when a suit has been disposed of on a preliminary point.

The appellate court, when it disagreed with the trial court on the question of limitation, was perfectly competent to remand the proceedings. (*Sita Ram Goel v. Sukhmandi Daval*, 1973 A. L. J. R., 145, S. C.).

Remand cannot be utilised for the purpose of filling in gaps or lacunae. If the material is not adequate or sufficient to support either the plaintiff or the defendant, it does not become the duty of the Court to direct further enquiry into the facts. In the interests of justice if the Court thinks that some witness must be examined or measurement taken, it has ample power under O. 41, r. 27 or r. 25 but that is quite different from utilising the power of O. 41, r. 23 of remand. [*Siva Basavarva v. Ven'ataramaraju*, (1967) 1 An. W. R. 392].

Inherent power of remand.—There existed some doubts whether an order of remand can be passed by an appellate court apart from the provisions of this rule. Those doubts were set at rest by the decision in the case of [*Ghuznavi v. The Allahabad Bank Ltd.*, (1947) I. L. R. 44 Cal. 929 F. B.]. It may sometimes happen that a party has been materially prejudiced for want of a proper trial. In such case the appellate court can remand a case under its inherent power (S. 151) for the ends of justice even though the suit has not been disposed of on a preliminary point. It was held in the above case that the power of the appellate court with regard to a remand was not restricted to the case specified in Order 41, rule 23, C. P. C. and the legislature intended to recognise such powers as were exercised by the court under their inherent jurisdiction. Order 41, r. 23, must, therefore, be read together with S. 151 which expressly preserves the inherent powers of the court to make such orders as may be necessary for the ends of justice. Rule 23-A now codifies the principles enshrined in S. 151 of the Code that the appellate court has the same powers of remand as are provided in O. 41, r. 23 where the decree is reversed in appeal otherwise than on a preliminary point and a retrial is considered necessary.

No remand is called for when materials on the record are sufficient to decide the case. The parties should not be put to unnecessary expense if

there is sufficient evidence to dispose of the case. Nor is the appellate court entitled to remand a case when it comes to a different conclusion on merits and on evidence on the record from that arrived by the trial court on the ground that the evidence was not properly directed.

New Plea.—Only in exceptional cases and on good cause being shown should a case be remanded for rehearing on a new plea not raised in the pleadings nor even suggested.

An order of remand is interlocutory in nature ; it is not final unless it decides some cardinal point in the suit.

Appeal.—An appeal lies against an order under rule 23 or r. 23-A of Order 41, but Order 43 does not permit an appeal from an order of remand in exercise of inherent powers under S. 151, C. P. C.

Preliminary Point and Preliminary Decree.—As pointed out, a preliminary point within the meaning of Order 41, rule 23, is that point or issue the decision whereof in a particular way is sufficient to dispose of the whole suit. It comprehends all points of law or fact which may have prevented the court from disposing of the case on merits. Preliminary point is thus any point the decision of which avoids the full hearing of the suit. It is one which when decided in favour of the plaintiff permits the progress of the suit, but when decided against him concludes the suit. Such points may be issues of limitation or *res judicata*. A preliminary point also arises where a suit is dismissed on the ground that the plaintiff had no cause of action.

A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. A preliminary decree determines the rights of the parties with regard to some or one of the matters in controversy in the suit but does not completely dispose of the suit.

Preliminary Point and Preliminary issue.—In *Bai Bai v. Mahadeo Maruti*, (A. I. R. 1960 Bom. 543) it was observed that the expression 'preliminary point' does not mean the same thing as a 'preliminary issue' and that a 'preliminary point' means a point, the determination of which enables the trial court to pass a decree and relieves it from the necessity of determining the other points involved in the suit and even though the point decided by the trial court happens to be a point of fact, if the test is satisfied that the point was such that a decree could have been granted by the trial court on the basis of its decision on that point, then, it would be a preliminary point within the meaning of O. 41, r. 23. The expression is not confined to a point of law or to a point of jurisdiction. (*Maharaja Dharmendra Prashad Singh v. State of Uttar Pradesh*, A. I. R. 1973 All. 174).

Where appellate court may frame issues and refer them for trial.—In this connection it is necessary to notice the provisions of Order 41, r. 25 which provides that the lower appellate court may frame issues and refer them for trial to the court from whose decree the appeal is preferred, where the latter court has omitted to frame or try any issue, or to determine any question of fact, which appears to the appellate court essential to the right decision of the suit upon the merits ; such court shall then proceed to take the additional evidence required and try such issues, and shall return the evidence to the appellate court together with its findings thereon and the reasons thereof.

Appeal.—An order under r. 25 does not amount to an order remanding a case, within the meaning of Order 43, r. 1 (u), governing appeals from

orders, and is, therefore, not appealable. An order under this rule is not a final order and the court before which the case ultimately comes up can disregard the findings returned after remand. After the return of the findings the entire appeal is open for consideration at the final hearing.

Such evidence and findings returned by the court below form part of the record in the suit ; and either party may, within a time to be fixed by the appellate court, present a memorandum of objections to any finding. After the expiration of the period so fixed for presenting such memorandum the appellate court proceeds to determine the appeal. (O. 41, r. 26)

It is well settled by authority that a remand order cannot be passed to provide a fresh opportunity of producing evidence to a party or to provide opportunity to a party to fill up lacuna or lacunae in his evidence. (*Bashir Ahmad v. Smt. Zainabun Nisan*, 1973 A. L. J. 275).

Where the appellate court remands a case under r. 23 or r. 23A, or frames issues and refers them for trial under r. 25, it shall fix a date for the appearance of the parties before the court from whose decree the appeal was preferred for the purpose of receiving the directions of that court as to further proceedings in the suit. (O. 41, r. 26A).

DECREE IN APPEAL

Date and contents of decree.—(i) The decree of the appellate court shall bear the date on which the judgment was pronounced ; (ii) it shall contain the number of the appeal, the names and descriptions of the appellant and respondent, and a clear specification of the relief granted or other adjudication made ; (iii) it shall also state the amount of costs incurred in the appeal, and by whom or out of what property, and in what proportions such costs and the costs in the suit are to be paid ; and (iv) finally, it shall be signed and dated by the Judge or Judges who passed it. Where there is a difference of opinion between the Judges hearing the appeal the dissenting Judge need not sign the decree. (O. 41, r. 35).

Appeals from Appellate Decrees

100. Second Appeal.—(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed *ex parte*.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal be allowed to argue that the case does not involve such question :

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

Under the provisions of the old section as a general rule a second appeal lay on a question of law and the section expressly barred a second appeal on questions of fact. A second appeal lay to the High Court from a decree passed in appeal by any court subordinate to a High Court on any of the following grounds, namely :—(a) the decision being contrary to law or to some usage having the force of law ; (b) the decision having failed to determine some material issue of law or usage having the force of law ; (c) a substantial error or defect in the procedure provided by the Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

The Joint Committee of the two Houses of Parliament to which the Code of Civil Procedure bill and the Limitation Act, 1963, had been referred, felt that the scope of second appeals should be restricted so that litigations may not drag on for a long period. The new section lays down that save as otherwise expressly provided in the body of the Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law. In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal. Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question. But nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

The present amendment will largely curtail the right of second appeal. It is not based on realistic appraisal of the character of the judgment of the subordinate court, and is based on only substantial question of law. There is conflict of judicial decisions on the interpretation of the expression “substantial question of law”. The amendment has barred entertainment of a second appeal on the ground of error of law or procedure.

No second appeal lies from an order.

As a general rule a second appeal lies on a substantial question of law and the section expressly bars a second appeal on questions of fact. The principle on which S. 100, C. P. C., is based is that there should be an end of litigation on questions of fact even at the cost of occasional error. Section 101 lays down that no second appeal shall lie except on the grounds mentioned in S. 100. No court has power to add to or enlarge the grounds of second appeal set out

in S. 100. It has been held that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact however gross or inexcusable the error may seem to be. The High Court would not have jurisdiction to interfere in second appeal in what is virtually a question of fact even if the finding be erroneous. Sections 100 and 101, therefore, lay down the measure of finality where the decision turns on the balancing of evidence.

100-A. No further appeal in certain cases.—Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment, decision or order of such single Judge in such appeal or from any decree passed in such appeal.

Where the Letters Patent provided for an appeal from the decision of a single Judge of a High Court in an appeal from an appellate decree, that virtually amounted to a third appeal and in order to minimise delay in the final disposal of litigation, it has been provided that there shall be no further appeal against the decision of a single Judge in a second appeal.

101. Second appeal on no other grounds.—No second appeal shall lie except on the grounds mentioned in S. 100.

102. No second appeal in certain suits.—No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed three thousand rupees.

Under S. 102 no second appeal shall lie in a suit of the nature cognizable by a small cause court the value of which does not exceed Rs. 3,000, even though the suit has been tried without small cause court powers.

The amended section fixing the value of the subject-matter of the original suit at an amount not exceeding three thousand rupees has been made in consonance with the amended provisions of S. 90 of the Code whereunder a first appeal will not lie except on a question of law from a decree in any suit of the nature cognisable by courts of small causes when the amount or value of the subject-matter of the original suit does not exceed three thousand rupees. Section 102 now amended prohibits a second appeal in such a suit even on question of law.

103. Power of High Court to determine issue of fact.—In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,

(a) which has not been determined by the lower appellate Court or both by the Court of first instance and the lower appellate Court; or

(b) which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred in S. 100.

The old section has been replaced by the new section which incorporates the consequential changes made in S. 100, C. P. C., which permits a second appeal only on substantial question of law. The Joint Committee of both Houses of Parliament felt that as the second appeal would be confined to substantial question of law, the words "of fact" found in the old provision were not necessary.

The High Court has the power to dispose of a second appeal on a necessary issue if the evidence on the record is sufficient for the disposal of the appeal, and the issue has not been determined by the first appellate court or both by the court of first instance and the lower appellate court, or it has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in S. 100, *viz.*, substantial question of law.

APPEALS FROM ORDERS

[S. 104 and O. XLIII]

Appealable Orders.—Every order, which is not a decree, is not appealable. Only those orders which are specified in S. 104 and Order 43, r. 1, are appealable. They are as under :

104. Orders from which appeal lies.—(1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders :—

(a)	}	Annulled
(b)		
(c)		
(d)		
(e)		
(f)		

(ff) an order under S. 35-A ;

(ffa) an order under S. 91 or S. 92 refusing leave to institute a suit of the nature referred to in S. 91 or S. 92, as the case may be.

(g) an order under S. 95 ;

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree ;

(i) any order made under rules from which an appeal is expressly allowed by rules :

Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of less amount, ought to have been made.

(2) No appeal shall lie from any order passed in appeal under this section.

Section 104 provides that an appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders :

(a) an order under S. 35-A, *i. e.*, in a case where compensatory costs in respect of false or vexatious claims or defence have been awarded ;

(b) an order under S. 95, *i. e.*, in a case where compensation for obtaining arrest, attachment or injunction on insufficient grounds has been awarded ;

(c) an order under any of the provisions of the Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree ; and

(d) any order made under rules from which an appeal is expressly allowed by rules.

(e) Under the amended provision an appeal shall also lie from an order under S. 91 or S. 92 refusing leave to institute a suit of the nature referred to in S. 91 or S. 92, as the case may be.

No appeal shall lie from any order passed in appeal under this section.

Appeals from orders.—An appeal shall lie from the following orders under the provisions of S. 104, namely : —

(a) an order under rule 10 of Order VII returning a plaint to be presented to the proper court, except where the procedure specified in r. 10-A of O. VII (*viz.*, where a date of appearance in the court where plaint is to be filed after its return has been fixed) has been followed ;.....

(c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit ;

(d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte* ;.....

(f) an order under rule 21 of Order XI, *i. e.*, in case of non-compliance with an order for discovery ;.....

(i) an order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement ;

(j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale ;

(j-a) an order rejecting an application under sub-r. (1) of r. 106 of Order XXI, provided that an order on the original application, that is to say, the application referred to in sub-r. (1) of rule 105 of that order is appealable ;

(k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit.

(l) an order under rule 10 of Order XXII giving or refusing to give leave ;... ..

(n) an order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit ;

(n-a) an order under rule 5 or rule 7 of Order XXXIII rejecting an application for permission to sue as an indigent, person.

(p) orders in interpleader suits under rule 3, rule 4 or rule 6 of Order XXV ;

(q) an order under rule 2, rule 3 or rule 6 of Order XXXVIII ;

(r) an order under rule 1, rule 2, rule 2A, rule 4 or rule 10 of Order XXXIX ;

(s) an order under rule 1 or rule 4 of Order XL ;

(t) an order of refusal under rule 19 of Order XLI to readmit, or under rule 21 of Order XLI to re-hear an appeal ;

(u) an order under rule 23 or rule 23-A of Order XLI remanding a case where an appeal would lie from the decree of the appellate court ;... ..

(w) an order under rule 4 of Order XLVII granting an application for review. (O. 43, r. 1).

Order 43, rule 1 (k), C. P. C., provides that an appeal shall lie from an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit. Where the Court refuses the application for substitution, in effect it declares the suit as abated, because the effect of the order is nothing else than what will follow if no application for substitution was made by the heir within the time limited by law. Rule 3 (2) of Order XXII will thus be attracted and the suit shall be deemed to stand abated. As the effect of the order passed by the learned Munsif, in substance, was to declare the suit abated, appeal was maintainable. (*Radhey Lal v. Smt. Kalawati*, 1973 A. L. J. 257).

Right to challenge non-appealable orders in appeal against decrees.—Where any order is made under the Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced. In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded. (O. 43, r. 1-A).

When an appeal is barred by limitation and an application is made under S. 5 of the Limitation Act for condonation of the delay along with the memorandum of appeal, until the application under S. 5 is allowed the appeal cannot be filed or admitted at all. In other words, till a favourable order is made on the application under S. 5 the appeal is *non est*. In that event, the question of rejecting a memorandum of appeal does not arise at all at that stage. An order rejecting the memorandum of appeal following the rejection

of an application under S. 5 of the Limitation Act for condonation of the delay in filing the appeal is not a decree but an order against which an application in revision under S. 115 of the Code may lie but no appeal under O. 43, r. 1 of the Code can be preferred. (*Mamuda Khateen v. Beniyan Bibi*, A. I. R. 1976, F. B. 415).

APPEALS BY INDIGENT PERSONS

(Order XLIV)

Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as an indigent person, subject to the provisions relating to suits by indigent persons. [O. 44, r. 1 (1)].

Where an application is rejected under rule 1, the Court may, while rejecting the application, allow the applicant to pay the requisite court-fee, within such time as may be fixed by the Court or extended by it from time to time; and upon such payment, the memorandum of appeal in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance. (O. 44, r. 2).

Where an applicant, referred to in rule 1, was allowed to sue or appeal as an indigent person in the Court from whose decree the appeal is preferred, no further inquiry in respect of the question whether or no, he is an indigent person shall be necessary if the applicant has made an affidavit stating that he has not ceased to be an indigent person since the date of the decree appealed from; but if the Government Pleader or the respondent disputes the truth of the statement made in such affidavit, an enquiry into the question aforesaid shall be held by the appellate Court, or, under the orders of the appellate Court, by an officer of that Court.

Where the applicant is alleged to have become an indigent person since the date of the decree appealed from, the inquiry into the question whether or not he is an indigent person shall be made by the appellate Court or, under the orders of the appellate Court, by an officer of that Court unless the appellate Court considers it necessary in the circumstances of the case that the inquiry should be held by the Court from whose decision the appeal is preferred. (O. 44, r. 3).

APPEALS FROM INTERLOCUTORY ORDERS

As a general rule of law no appeal lies against an interlocutory order which is not sufficient to dispose of the suit as a whole, except where an appeal is expressly provided. The best test to ascertain whether an erroneous interlocutory order has affected the ultimate decision on the merits is to see whether the court would have come to the same decision had the erroneous order not been passed. There are interlocutory orders which can be challenged in an appeal against the final decree. As said above, they are of such a nature as would or might have induced the court to alter its decision; for instance an order refusing to admit a document which is in law admissible or to examine a witness or to issue a commission or some such act which is calculated ultimately to influence the decision of the court on the merits.

Then there are interlocutory orders against which no appeal has been provided for and even they can be challenged in an appeal from the decree in the manner set forth in S. 105 of the Code of Civil Procedure. That section reads:

105. Other Order.—(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction ; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-s. (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

The first part of the sub-section postulates that no appeal shall lie from any order unless such right is expressly provided by the Code. They are so provided in S. 104 and Order 43, r. 1, already discussed above under the heading "Appeals from Orders." The second part of the sub-section provides that if a party does not appeal from an interlocutory order either because no appeal is permissible or because the party does not elect to file an appeal where it is permissible, the party may wait until the whole cause has been decided and make objections against the interlocutory order in the memorandum of appeal filed against the decree in the suit in which the interlocutory order was made, if the error, defect or irregularity in making the same affects the decision of the case *on the merits*. The error, defect or irregularity within the meaning of S. 105, must mean an error, defect or irregularity in procedure or in law and not in matters of fact.

An order allowing or refusing amendment of a plaint can be challenged under S. 105, C. P. C. in the appeal from the decree that may be finally passed in the suit. The order of amendment may not affect the decision of the case as ultimately placed before the trial court after the amendment, but S. 105 does not preclude the appellate court from deciding whether the order of amendment affects the decision as originally placed before the trial court, [*Patramdas v. Mangalchand*, I. L. R. (1953) 3 Raj. 880].

The word "decision" in S. 105 means decision upon the merits.

The principle of S. 105, C. P. C. extends to interlocutory orders passed in execution proceedings and error or defect in such interlocutory order could be set forth as a ground of objection in the appeal. (*Shahul Hameed Kunju v. Mohamed Kunju*, I. L. R. 1951 T. C. 639).

In case of execution proceedings also, every order passed by an execution court in the course of proceedings under S. 47 does not necessarily amount to a decree so as to be appealable. In order to amount to a decree an order must be the formal expression of an adjudication which so far as regards the court expressing it conclusively determines the rights of the parties with regard to the matters in controversy. Interlocutory orders in execution proceedings which merely express the opinion of the court without finally determining the rights of the parties are not, therefore, appealable.

Apart from the above the principle of S. 105 extends to interlocutory orders passed in execution proceedings and error or defect in such interlocutory order could be set forth as a ground of objection in the appeal. But where no objection is raised in the memorandum of appeal, the appellant is disentitled to question the correctness of the interlocutory order. [*Shahul Hameed Kunju v. Mohamed Kunju*, 1951 I. L. R. 1951 T. C. 639].

106. What Courts to hear appeals.—Where an appeal from any order is allowed it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.

107. Powers of Appellate Court.—(1) Subject to such conditions and limitations as may be prescribed, an appellate Court shall have power —

(a) to determine a case finally ;

(b) to remand a case ;

(c) to frame issues and refer them for trial ;

(d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

It is, however, a rule of practice that when there is a conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witness, then unless there is some special feature about the evidence of a particular witness which has escaped the trial judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies the appellate court should not interfere with the finding of the trial judge on a question of fact. It would not detract from the value to be attached to a trial judge's finding of fact that the judge does not expressly base his conclusion upon the impressions he gathers from the demeanour of witnesses. (*Sarju Prasad v. Jwaleshwari*, 1971 A. L. J. 1).

The provisions of S. 107 as elucidated by O. 41, r. 27, are clearly not intended to allow a litigant who has been unsuccessful in the lower court to patch up the weak parts of his case and fill up omissions in the court of appeal. Under r. 27, cl. (1) (b), it is only where the appellate court 'requires' it, that is, finds it needful, that additional evidence can be admitted. It may

be required to enable the court to pronounce judgment, or for any other substantial cause, but in either case it must be the court that requires it. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent. (*Union of India v. Wazir Chand*, A. I. R. 1966 Him. Pra. 40).

108. Procedure in appeals from appellate decrees and orders.—The provisions of this Part relating to appeals from original decrees shall, so far as may be, apply to appeals—

(a) from appellate decrees, and

(b) from orders made under this Code or under any special or local law in which a different procedure is not provided.

APPEALS TO THE SUPREME COURT

(S. 109 and Order XLV)

Appeals to the Supreme Court are governed by S. 109 of the Code of Civil Procedure, read with Art. 133 of the Constitution of India which may be quoted *in extenso*.

109. When appeals lie to the Supreme Court.—Subject to the provisions in Chapter IV of Part V of the Constitution and such rules as may, from time to time, be made by the Supreme Court regarding appeals from the Courts of India, and to the provisions hereinafter contained, an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court, if the High Court certifies --

(i) that the case involves a substantial question of law of general importance ; and

(ii) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.¹

110. ²[* * *]

[Prior to the amendment of Art. 133 of the Constitution and S. 109 of the Code of Civil Procedure and deletion of S. 110 of the Code the appellate jurisdiction of the Supreme Court in civil matters was as follows :—

(1) There was an unrestricted right of appeal to the Supreme Court where the value of the subject-matter of the dispute was not less than Rs. 20,000 or where the order of the High Court involved directly or indirectly some claim or question respecting property of that amount or value—

(a) if the judgment or the final order of the High Court was passed in exercise of its original jurisdiction (ordinary or extraordinary),

1. As amended by the Code of Civil Procedure (Amendment) Act, 1973.

2. This section was omitted by the Code of Civil Procedure (Amendment) Act, 1973.

(b) if in exercise of its appellate jurisdiction, the High Court reversed the judgment or order of the court below.

(2) Where the appellate judgment of the High Court was one of affirmance, there should also have been "some substantial question of law" involved.

(3) Where the High Court certified that the case was fit for appeal to the Supreme Court, the pecuniary limit did not apply.]

Sections 109 and 110 of the Code of Civil Procedure, 1908, and connected provisions in rules 3, 4 and 5 of Order XLV and Form No. 12 in Appendix G of the First Schedule to the said Code laid down the criterion of valuation of property or the subject-matter of dispute for purposes of appeal to the Supreme Court. Those provisions were in keeping with the corresponding provision of clause (1) of article 133 of the Constitution as it stood before its amendment by the Constitution (Thirtieth Amendment) Act, 1972. Under clause (1) of article 133 as amended by the said Act, an appeal now lies to the Supreme Court only if the High Court certifies that the case involves a substantial question of law of general importance, and that in the opinion of the High Court the said question needs to be decided by the Supreme Court. As a consequential measure, it became necessary to amend suitably Ss. 109 and 110 of the Code and the connected provisions referred to above. The Civil Procedure (Amendment) Act, 1973, gave effect to this object by substituting a new section, viz., S. 109, and deleting S. 110, C. P. C.

To the same effect are the provisions contained in Article 133 of the Constitution. It reads :

133. Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters.—(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—

(a) that the case involves a substantial question of law of general importance ; and

(b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.

(2) Notwithstanding anything in Art. 132, any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of the Constitution has been wrongly decided.

(3) Notwithstanding anything in this article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court.

Clause (1) of Art. 133 of the Constitution, as stated above, was amended by the Constitution (Thirtieth Amendment) Act, 1972. The Act came into force from February 27, 1973. Appeals from High Courts in regard to civil matters will, after the amendment of Article 133 (1) of the Constitution, lie in the Supreme Court only in the event of the High Court issuing a certificate to the effect that the case involves a substantial question of law of general importance and needs to be decided by the Supreme Court. Such appeals from the High Courts would be preferred irrespective of the value of the property involved in that case.

Prior to the amendment of article 133 of the Constitution and S. 109, C. P. C. and deletion of S. 110, C. P. C., an appeal lay to the Supreme Court from a High Court in regard to a civil matter *inter alia* on a certificate issued by the High Court that the amount or value of the subject-matter of the dispute was not less than Rs. 20,000 or that the judgment, decree or final order involved some claim or question in respect of property of the like amount or value.

Article 133 of the Constitution and S. 109, C. P. C., as amended, provide that an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court if the High Court certifies that the case involves a substantial question of law of general importance or that, in its opinion, the said question needs to be decided by the Supreme Court.

Appeals that might be pending before the Supreme Court already preferred to it because a High Court might already have given certificate would not be affected by the amendment.

Under Article 136 of the Constitution of India the Supreme Court has also got the power to grant special leave to appeal from any judgment, decree, determination or order in any cause or matter passed or made by any court or tribunal in the territory of India. Rule 1 of Order XVI of the Supreme Court Rules, 1966, further provides that a petition for special leave to appeal shall be lodged in the Supreme Court within sixty days from the date of the order of refusal of leave to appeal by the High Court, and, in any other case, within ninety days from the date of the judgment or order sought to be appealed from ; but the Supreme Court may for sufficient cause extend the time on application made for the purpose.

It might be stated that before India attained full independence appeals used to be filed in the Privy Council and the valuation of the suit in the trial court as also of the proposed appeal to their Lordships of the Judicial Committee required was only Rs. 10,000. The necessary amendments were introduced by the Adaptation of Laws Order, 1950. The pecuniary limit was subsequently raised to Rs. 20,000 in view of the depreciation of the rupee.

Since the Constitution came into force leave is to be granted under Art. 133 (1), and section 109, C. P. C., must be read subject to Art. 133. They cannot prevail over Art. 133 (1). (*Lalmina Singh v. Kumar Kamal Singh*, A. I. R. 1952 Pat. 450).

The main principles bearing on section 109 of the Code may now be discussed in the light of leading cases.

Meaning of the expression 'judgment, decree or final order.'—It has been well settled that the word 'judgment' in Art. 133 has been used in the sense of a decision finally determining the rights of the parties in the proceeding and not as defined in the Code of Civil Procedure. Certain applications for review were admitted by the Board of Revenue. Applications were made in the High Court under Art. 226 for quashing the orders of the Board admitting the review application. These writ petitions were rejected. It was held that the judgment of the High Court rejecting the writ petition was a judgment, decree or final order within the meaning of Art. 133 and consequently an appeal lay to the Supreme Court against such judgment. (*Srimati Indo Devi v. The Board of Revenue*, U. P., 1956 A. L. J. 601).

An order on a reference under S. 66 (2) of the Indian Income-tax Act, 1922, [S. 256 (2) of the 1961-Act] is not a 'judgment, decree or final order', within the meaning of Art. 133 and therefore no appeal from it is competent. (*Pahlad Rai and Co. v. Commissioner of Income-tax*, A. I. R. 1952 Punjab. 229).

A final order as contemplated by section 109 (a) C. P. C., must be one which affects finally the rights of the parties, or decides finally any question directly at issue in the case in respect of the rights of any of the parties. The test is whether the judgment or order finally disposes of the rights of the parties. The mere fact that the order decides an important and even vital issue is by itself not material unless the decision puts an end to the suit. The finality must thus be a finality in relation to the suit. (*Mohammad Amin Bros. Ltd. v. Dominion of India*, A. I. R. 1950 F. C. 77).

The word 'decree' in Art. 133 of the Constitution is not qualified by the words "preliminary" or "final" and leave to appeal can be given against a preliminary decree for accounts. The test for determining the finality of an order is whether the judgment or order finally disposes of the rights of the parties in relation to the suit and not whether further proceedings have to be taken before the suit can be completely disposed of and a preliminary decree satisfies this test. (*Ganeshdass v. Murlithar*, M. B. L. J. 1955 H. C. R. 2010).

An order dismissing an application for setting aside an order of dismissal for default is not a final order within the meaning of Art. 133 and such an order cannot be said to be interlocutory also. The order refusing to revive the appeal did not, standing by itself, affect the rights of the parties. Those rights had been disposed of by the dismissal of the appeal for want of prosecution; the order complained of only refused to allow the matter to be reagitated. It is an order relating to procedure and not to the merits of the appeal. [*Mahmood Hasan Khan v. Government of U. P.*, 1956 A. L. J., 679 (F. B.)].

An order removing or appointing a receiver or a provisional liquidator does not decide the rights of the parties. As a general rule interlocutory orders cannot form the subject for review by the Supreme Court. An order remanding a suit to the original court for disposal on the merits is neither a decree nor a final order. (*Abdul Rahman v. D. K. Cassim & Sons*, 69 I. A. 76). An order of remand does not finally dispose of the rights of the parties and leave to appeal to the Supreme Court cannot be given. (*Daulal Ram Singh v. Swami Dayal*, 1955 A. L. J. 59). The suit despite the order of remand is a live suit. Similarly an order of the High Court remanding an execution petition (holding that it was not barred by time) for further hearing and disposal by the lower court is not a final order. (*Ramaswamy Chettiar v. Official Receiver, Ramana-thapuram*, A. I. R. 1951 Mad. 1051).

An order appointing an *ad interim* receiver is not a judgment within the meaning of that term in clause 10 of the Letters Patent. In order to claim leave to the Supreme Court under Art. 133 of the Constitution the applicant must establish that the order was a judgment, decree or order finally determining the rights of the parties. No certificates are granted in cases when the rights of the parties had yet to be determined and the order was merely an interlocutory order.

A "final order" within the meaning of section 109, C. P. C., is one deciding finally any question at issue in the cause of the rights of any of the parties. An order appointing or refusing to appoint a provisional liquidator does not decide the rights of the parties, although the decision of that question will have an effect upon the liquidation proceedings. Such an order

is not final but only an interlocutory order. (*Jhabar Mal Chokhani v. Punjab Pictures Ltd.*, A. I. R. 1949 E. P. 261).

The order of the judge appointing an *ad interim* receiver is not a judgment within the meaning of that term in clause 10 of the Letters Patent. For leave to appeal to the Supreme Court under S. 133 of the Constitution the applicants have to establish that it is a judgment, decree or final order. It has been held now finally that the words 'judgment, decree or final order' in S. 205 of the Government of India Act and in clause 30 of the Letters Patent mean the order finally determining the rights of the parties.

Applications for leave to appeal to the Privy Council were, as also to the Supreme Court are, only entertained against orders that have finally decided the matter pending in the lower courts and no certificate is granted in cases when the rights of the parties have yet to be determined and the order is merely an interlocutory order.

Procedure in appeals to Supreme Court.—The party desiring to appeal to the Supreme Court should apply by petition to the Court whose decree is complained of, *viz.*, the High Court. [O. 45, r. 2 (1)]. Every petition under sub-r. (1) shall be heard as expeditiously as possible and an endeavour shall be made to conclude the disposal of the petition within sixty days from the date on which the petition is presented to the Court under sub-r. (1). [O. 45, r. 2 (2)]. Every petition should state the grounds of appeal and pray for a certificate—(i) that the case involves a substantial question of law of general importance, and (ii) that in the opinion of the Court the said question needs to be decided by the Supreme Court. (O. 45, rr. 2 and 3).

Upon receipt of such petition, the High Court directs notice to be served on the opposite party to show cause why the said certificate should not be granted. After the parties have been heard, the certificate may either be refused or granted. Where the certificate is refused the petition is dismissed. (O. 45, r. 6). Where it is granted, the applicant should, within 90 days, or such further period, not exceeding 60 days, from the date of the decree complained of, or within six weeks of the date of the granting of the certificate, whichever is the later date, furnish security in cash or in Government securities for the costs of the respondent, and deposit the amount required to defray the expenses of translating, transcribing, indexing, printing and transmitting to the Supreme Court a copy of the record of the suit. Where such security has been furnished and deposit made, the Court shall declare the appeal admitted, give notice thereof to the respondent, transmit to the Supreme Court under the seal of the Court a correct copy of the said record and give to either party authenticated copies of any of the papers in the suit on his paying the reasonable expenses incurred in preparing them. (O. 45, rr. 7 and 8).

Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed unless the Court otherwise directs. (O. 45, r. 13).

Special leave to appeal as an indigent person.—A petition for special leave to appeal as a an indigent person has to be made to the Supreme Court. The High Court has no power to grant such leave. Such petition shall be accompanied by an affidavit from the petitioner stating that he is not entitled to property worth Rs. 1,000/- other than the property exempt from attachment in execution of a decree, and the subject-matter of the intended appeal, and that he is unable to provide sureties and pay court fees, and also by a certificate of counsel that

the petitioner has reasonable ground of appeal. The other rules relating to appeals by indigent persons as provided in the Code apply *mutatis mutandis* to petitions for special leave to appeal as an indigent person.

Procedure to enforce orders of the Supreme Court.—A person desiring to obtain execution of any decree or order of the Supreme Court has to apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the court from which the appeal to the Supreme Court was preferred, *i. e.*, the High Court. Such Court shall transmit the order of the Supreme Court to the court which passed the first decree appealed from, or such other court as the Supreme Court may direct, giving such directions as may be required for the execution of the same. (O. 45, r. 15).

Appeal from order relating to execution.—The orders made by the court which executes the decree or order of the Supreme Court relating to such execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees. (O. 45, r. 16).

111.*

111-A.**

112. Savings.—(1) Nothing contained in this Code shall be deemed—

(a) to affect the powers of the Supreme Court under Article 136 or any other provisions of the Constitution ; or

(b) to interfere with any rules made by the Supreme Court, and for the time being in force, for the presentation of appeals to that Court, or their conduct before that Court.

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts.

*This section was omitted by the Adaptation of Laws Order, 1950.

**This section was omitted by the Federal Court Act, 1941, (Act No. XXI of 1941).

PART VIII
REFERENCE, REVIEW AND REVISION

[Ss. 113-115 and Orders XLVI & XLVII]

Reference [S. 113 and O. XLVI]

113. Reference to High Court.—Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit :

Provided that where the Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for the opinion of the High Court.

Explanation.—In this section “Regulation” means any Regulation of the Bengal, Bombay or Madras Code or Regulation as defined in the General Clauses Act, 1897, or the General Clauses Act of a State.

Order 46, rule 1, C. P. C., prescribes the conditions to be satisfied to enable a subordinate court to make a reference, either of its own motion or on the application of any of the parties. It reads :

Reference of question to High Court.—Where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court.

The conditions which permit a reference are :

(1) There arises a question of law in any suit, appeal or execution from which no appeal lies ;

(2) There is reasonable doubt on such question ;

(3) The Court draws up a statement of the facts of the case and the point on which doubt is entertained ; and

(4) The court expresses its own opinion on the point.

A reference can be made to the High Court under this rule only in suit or appeal arising out of a suit or in the execution of any such decree, and not in every matter before the court in which a point arises on which the court entertains a reasonable doubt. The object of S. 113 is to enable the subordinate court to obtain, in non-appealable cases, the opinion of the High Court in advance on a question of law and thereby avoid the commission of an error which could not be remedied later on.

The court making a reference may either stay the proceedings or pass a decree contingent upon the decision of the High Court on the point referred, such decree or order not being executable until the receipt of a copy of the judgment of the High Court upon the reference. (O. 46, r. 2). The High Court after hearing the parties, if they desire to be heard, shall decide the point and transmit a copy of its judgment to the court which made the reference. Such court shall then dispose of the case in conformity with the decision of the High Court. The costs consequent on a reference for the decision of the High Court shall be costs in the case. (O. 46, rr. 3 and 4).

Power of the High Court.—The High Court may on reference return the case for amendment, or alter, cancel or set aside any decree or order which the court making the reference has passed or made, and make such order as it thinks fit. (O. 46, r. 5).

The above provision shows that when the High Court hears a reference it acts like a court of appeal.

Power to refer to High Court questions as to jurisdiction in small causes.—At any time before judgment a court in which a suit has been instituted may refer to the High Court questions as to jurisdiction in small causes where it entertains doubts whether the suit is cognisable by a court of small causes or not. (O. 46, r. 6).

REVIEW

(S. 114 and O. XLVII)

114. Review.—Subject as aforesaid, any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed by this Code, or

(c) by a decision on a reference from a Court of Small Causes,

may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

All decrees or orders cannot be reviewed. The right of review has been conferred by S. 114 and O. 47, r. 1, of the Code. Section 114 provides that any person considering himself aggrieved (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred, (b) by a decree or order from which no appeal is allowed by this Code, or (c) by a decision on a reference from a court of small causes, may apply for a review of the judgment to the court which passed the decree or made the order on any of the following grounds mentioned in O. 47, r. 1, viz.—

(1) discovery by the applicant of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or

(2) on account of some mistake or error apparent on the face of the record, or

(3) for any other sufficient reason,

and the court may make such order thereon as it thinks fit.

Explanation :—The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment.

1. **Discovery of new and important matter or evidence.**—The party seeking review must show that he exercised greatest care in adducing all possible evidence and that the new evidence is such as is relevant and that if it had been given in the suit it might possibly have altered the judgment. It is not the discovery of new and important evidence alone which entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made. The case cannot be reopened because the law has been modified by subsequent legislation. The ground for review, viz., new matter or evidence must be something which existed at the date of the decree; the decree cannot be reviewed on the ground of the happening of some subsequent event.

Accordingly, a subsequent reversal of a judgment on which the decision was based, a subsequent decision in another case between the parties or a different view of the law taken by the court in a subsequent case are not grounds for review.

An application for review on the ground of discovery of new evidence should show that (i) such evidence was available and of undoubted character; (ii) that the evidence was so material that its absence might cause a miscarriage of justice; and (iii) that it could not with reasonable care and diligence have been brought forward at the time of the decree. (1939 Cal., 42). The applicant has, however, to satisfy that there was no remissness on his part.

2. **Mistake or error apparent on the face of the record.**—It is not limited to a mistake of fact. It may be of law. Failure to consider a ruling is not such an error. It should be an error which can be seen by a mere perusal of the record without reference to any other extraneous matter. Where, therefore, the legal position is clearly established by a well-known authority, but the Judge has by some oversight failed to notice the same and thus gone wrong,

it will be a case coming within the category of an error apparent on the face of the record. The error has to be patent, and an ordinary error of law or a mere failure to interpret a complicated point of law correctly is not an error of law apparent on the face of the record.

An error of law will justify a review because an error apparent on the face of the record will also include an error of law. In a review petition the Court may correct an error apparent on the face of the record but cannot pass a fresh decree for the first time. In returning the plaint the Court directed that costs incurred should abide the result of the suit. But in review application the Court directed the plaintiff to pay the costs of the defendants. The Court is not justified in doing so. [*Duvvuri Chengal Reddi v. Devareddi Venkatasubbareddi*, (1967) 2 An. W. R. 432].

3. Any other sufficient reason.—These words have been interpreted by their Lordships of the Judicial Committee in *Chajju Ram v. Neki* (A. I. R. 1922 P. C. 112) to mean a reason sufficient on ground at least analogous to those specified in (1) and (2).

Their Lordships observed in *Chajju Ram's* case that the Code contemplates procedure by way of review by the court which has already given judgment as being different from that by way of appeal to a Court of Appeal. The three cases in which alone mere review is permitted are those of a new material overlooked by excusable misfortune, mistake or error apparent on the face of the record, or any other sufficient reason.

The phrase “any other sufficient reason” means a reason at least analogous to those specified in the rule immediately previously, namely, excusable failure to bring to the notice of the court new and important matter or evidence or mistake or error on the face of the record. (*Moran Mar Baselius Cathoticos v. Mar Poulse Athanasius*, I. L. R. 1952 T. C. 1031).

The rule set out above is definitive of the grounds on which a review is permissible, but apart from it the court has an inherent power under S. 151 to review its wrong orders or decisions passed previously. But recourse to the inherent powers of the court is not permissible to justify a court in granting a review which is specifically provided for in O. 47, r. 1.

Appeal and Review. —Where an appeal has been preferred a review application does not lie. But an appeal may be filed after an application for review. In such event the hearing of the appeal will have to be stayed. If the review succeeds the appeal becomes infructuous for the decree appealed from is superseded by a new decree. No court can, however, review its order after it has been confirmed on appeal.

A party who is not appealing from a decree or order may, however, apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

Who can apply for review.—Rule 1 of Order 47 says that any person considering himself aggrieved by a decree or order, etc., may apply for a review of judgment. The aggrieved person is one who has suffered a legal grievance, i. e., against whom a decision has been pronounced which has wrongfully affected his title or wrongfully deprived him of something which he was entitled to. A legal representative may apply for a review. The court

cannot review *suo motu* or on its own motion nor can a superior court direct an inferior court to review its previous decision.

Application where rejected.—An application for review shall be rejected where there is not sufficient ground for review.

Application where granted.—No application for review, however, shall be granted without previous notice to the opposite party to appear and oppose the application. It shall also not be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge at the time of the passing of the decree or order, without strict proof of such allegation. (O. 47, r. 4).

Where the judge or judges, or any one of the judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such judge or judges or any of them shall hear the application, and no other judge or judges of the court shall hear the same. (O. 47, r. 5).

The intention of the legislature was that if an error apparent on the face of the record is sought to be pointed out then rule 5 provides that the judge or judges who had fallen into the alleged error should have an opportunity to reconsider it. The period of 6 months has been provided so that even at the expiry of six months' delay if this rule could work it should be adhered to. It cannot be construed to mean that the right of review itself would stand negatived if for some reason such judge or judges ceased to occupy the position or are not available for any length of time beyond six months. Such an interpretation would render the availability of the remedy dependent on circumstances over which an applicant has no control. (*Bhera v. Board of Revenue*, A. I. R. 1975 Raj., 55).

Where the application for a review is heard by more than one judge and the court is equally divided, the application shall be rejected. Where there is a majority, the decision shall be according to the opinion of the majority. (O. 47, r. 6).

An order of the court rejecting the application for review shall not be appealable, but an order granting an application may be objected to at once by an appeal from the order granting the application or in an appeal from the decree or order finally passed or made in the suit.

In case the application has been rejected on failure of the applicant to appear, the court may restore the rejected application to the file on being satisfied that the applicant was prevented by sufficient cause from appearing upon such terms as to costs or otherwise as it thinks fit. (O. 47, r. 7).

No application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained. (O. 47, r. 8).

Revision

(S. 115)

115. Revision.—(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

- (a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it things fit :

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where—

- (a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or
- (b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

Explanation.—In this section, the expression “any case which has been decided” includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.

Section 115 confers power of revision on the High Court in a case not subject to appeal thereto. According to the Law Commission, errors of jurisdiction and errors apparent on the face of the record could be corrected under Art. 227 of the Constitution. But the third clause under S. 115 could not be covered by Art. 227, viz., when the court acts or exercises jurisdiction on the subordinate court's acting in the exercise of its jurisdiction illegally or with material irregularity. The remedy under Art. 227 is also costly for the poor litigants, and the remedy provided in S. 115 is, on the other hand, cheap and easy. The Committee, however, felt that, in addition to the restrictions contained in S. 115, an overall restriction on the scope of applications for revision against interlocutory orders should be imposed. Having regard to the recommendations made by the Law Commission in its Fourteenth and Twenty-seventh Reports, the Committee recommended that S. 115 of the Code should be retained subject to the modification that no revision application shall lie against an interlocutory order unless either of the following conditions is satisfied, namely :—

- (i) that if the orders were made in favour of the applicant, it would finally dispose of the suit or other proceeding ; or
- (ii) that the order, if allowed to stand, is likely to occasion a failure of justice or cause an irreparable injury.

The Committee felt that the expression 'case decided' should be defined so that the doubt as to whether S. 115 applies to an interlocutory order may be set at rest. Accordingly the Committee have added a proviso and an Explanation to S. 115. The proviso added to S. 115 of the principal Act re-numbered as sub-s. (1) thereof, reads :

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where—

(a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

[Under the Uttar Pradesh Civil Laws (Amendment) Act, 1973, for S. 115 of the Code of Civil Procedure, 1908, as amended in its application to Uttar Pradesh the following section has been substituted, namely :—

“The High Court in cases arising out of original suits of the value of rupees twenty thousand and above including such suits instituted before the 20th day of September, 1972, and the District Court in any other case, including a case arising out of an original suit instituted before the 20th day of September, 1972, may call for the record of any case which has been decided by any court subordinate to such High Court or District Court, as the case may be and in which no appeal lies thereto, and if such subordinate court appears :—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court or the District Court, as the case may be, may make such order in the case as it thinks fit:

Provided that in respect of cases decided before the 20th day of September, 1972, and also all cases arising out of original suits of any valuation decided by the District Court, the High Court alone shall be competent to make an order under this section.”

The above provision, as stated above, extends only to Uttar Pradesh].

The High Court's revisional powers cannot be invoked unless the following conditions exist :

(1) there must be a case decided ;

(2) the court deciding the case must be subordinate to the High Court ;

(3) no appeal should lie to the High Court against the decision ;

(4) in deciding the case the subordinate court must appear to have :

(a) exercised a jurisdiction not vested in it by law ; or

(b) failed to exercise a jurisdiction vested in it by law ; or

(c) acted in the exercise of its jurisdiction illegally or with material irregularity. [*Baldevdas Shirla! v. Filmistan Distributors (India) Pvt. Ltd.* (1970) 1 S. C. J. 242].

Scope.—In the exercise of revisional powers it is not the duty of the High Court to enter into the merits of the evidence ; it has only to see whether the requirements of the law have been duly and properly obeyed by the court whose order is the subject of the revision and whether the irregularity as to failure or exercise of jurisdiction is such as to justify interference with the order. The remedy by way of revision cannot be denied in a case where the order is not appealable and in which one or the other condition stated in S. 115 is satisfied. [*Municipal Council, Bhopal v. Haji Syed Tasadaq Hussain*, 1966 M. P. L. J. (Notes) 149].

Jurisdiction.—Section 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it. But the mere fact that the decision of the lower court is erroneous, whether it be upon a question of fact or law, does not amount to an illegality or material irregularity. Therefore, the High Court will not interfere in the exercise of its revisional jurisdiction merely because the lower court wrongly decides that a particular suit is barred by *res judicata*, or that it is barred by limitation or because it proceeds upon an erroneous construction of the various provisions of an Act. In *Amir Hasan v. Sheo Baksh*, (11 I. A. 237) it was emphasised by their Lordships of the Judicial Committee that where the subordinate court has jurisdiction to determine a question it has jurisdiction to decide wrong as well as right and that a wrong decision is not an illegal or materially irregular exercise of jurisdiction. The Judicial Commissioner or the High Court has no jurisdiction in such a case.

The facts in *Amir Hasan's* case were as follows :

The suit was brought by the plaintiff appellant for possession on redemption of a three-fourths share in Kaka Khanpur. The first two Courts decreed the suit in favour of the appellant, and the second decree became final under section 622 of Act X of 1877. A petition was presented to the Judicial Commissioner, alleging that the first Court had no jurisdiction to try the case, and asking that the record might be sent for and the decrees reversed. On the 7th February, 1880, the Judicial Commissioner dismissed the suit with costs in all three Courts. He did not find thereon that the first Court had no jurisdiction, but that the Courts below had exercised their jurisdiction illegally and to the material prejudice of the applicant, and thereon founded the decree appealed from.

The judgment of their Lordships of the Judicial Committee was delivered by Sir Barnes Peacock :

The question in this case depends upon the proper construction to be put upon Act X of 1877, section 622, and upon Act XII of 1879, section 92, by which the former section was amended. According to Act XIII of 1879, section 21, there was no appeal in this case from the Lower Court of Appeal to the Judicial Commissioner. But section 622 of Act X of 1877 enacted that "the High Court",—and in this respect the Judicial Commissioner exercises the same powers as the High Court—"may call for the record of any case in which no appeal lies to the High Court if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, and may pass such order in the case as the High Court thinks fit." By section 92 of Act XII of 1879 that section was amended by the insertion after the words "so vested" of the following words, "or to have acted in the exercise of its jurisdiction illegally or with material irregularity." The question then is, did the judges of the Lower Court in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide

the question which was before them, and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case ; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity.

Their Lordships therefore thought that under section 622 of Act X of 1877, as amended by section 92 of Act XII of 1879, the Judicial Commissioner had no jurisdiction in the case. Under these circumstances their Lordships would humbly advise Her Majesty to allow this appeal, and to reverse the judgment of the Judicial Commissioner, and to order the respondent to pay the costs incurred before the Judicial Commissioner. He must also pay the costs of this appeal.

To come to an erroneous conclusion does not amount to acting with material irregularity or illegality and a court has as much jurisdiction to pass a correct order as a wrong one. The court's coming to an erroneous view will not justify interference in revision under S. 115, C. P. C. (*Keshardeo Chamaria v. Radhā Kissen Chamaria and others*, A. I. R. 1953 Supreme Court, 23).

By its clauses (a) and (b), S. 115 empowers the High Court to satisfy itself (a) that the order of the subordinate court is within its jurisdiction, and (b) that the case is one in which the court ought to exercise jurisdiction. Therefore, where the court by a wrong or erroneous finding assumes jurisdiction which it has not, or refuses to exercise a jurisdiction which it ought to exercise, then the matter becomes revisable by the High Court. (*Narshihprasad v. Vidutray*, A. I. R. 1954 Saurashtra 66, F. B.).

The decision of the subordinate court on all questions of law and fact not touching its jurisdiction is final and however erroneous such a decision may be, it is not revisable under sub-ss. (a) and (b) of S. 115, C. P. C. On the other hand, if by an erroneous decision on a question of fact or law touching its jurisdiction, e. g., on a preliminary fact upon the existence of which its jurisdiction depends, the subordinate court assumes a jurisdiction not vested in it by law or fails to exercise a jurisdiction so vested, its decision is not final, and is subject to review by the High Court in its revisional jurisdiction under the sub-sections. [S. *Rama Iyer v. Sundaresa Ponnappoondar*, (1966) 2 S. C. J. 576.]

If the jurisdiction under S. 115, C. P. C. is invoked, the applicant must show not only that a jurisdictional error has been committed by the court below but also that the interests of justice call for interference by the High Court. The powers of the Court under S. 115 of the Code are to be exercised in its discretion, and discretionary powers should be exercised in the interests of justice. (*Director, Indian Agricultural Research Institute, New Delhi v. Vidya Sagar*, A. I. R. 1973 Himachal Pradesh, 29).

The power to interfere under S. 115 is much circumscribed. Unless the lower appellate court had exercised jurisdiction where it had none or exercised it illegally or with material irregularity, the High Court cannot interfere with the order of the lower appellate court even when the order sought to be revised be erroneous or not in accordance with the law. (*Rajaram Nathuji Pathode v. Maniram Sambha Kose*, A. I. R. 1975 Bom. 1).

The words 'acting illegally' would mean acting in breach of some provisions of law and the words 'acting with material irregularity' would mean committing some error of procedure and in the course of proceedings, which is material in the sense that it may have affected the ultimate decision. There-

fore, it is only when a Court decides a case perversely that it can be said to act illegally or with material irregularity in the exercise of its jurisdiction and the other errors of questions of law or procedure are outside the scope of cl. (c) of S. 115 of the Civil Procedure Code. Where a lower court passes an order in exercise of its jurisdiction, the High Court will not interfere with it in revision. The grant of *ad interim* injunction is within the discretion of the trial court. Where it has been shown that *ad interim* injunction had been granted by the said court against the principles governing the same, it cannot be said that the court below, while granting the *ad interim* injunction, had acted illegally or with material irregularity in exercise of its jurisdiction. (*Punjab State Electricity Board, Patiala v. M/s. Ramji Lal Basant Lal, Chandigarh*, 1975 P. L. R., 115).

Where the trial court has the jurisdiction to reject a document or impound it as also the jurisdiction to receive it on recording reasons showing as to why its receipt as evidence was justified and it takes the view that the document concerned can be easily procured for purposes of litigation and that its genuineness is not beyond suspicion, the order passed by it refusing to take the document on record does not call for any interference under S. 115. (*Ram Lal Dhirta Ram v. The Delhi Municipal Corporation Delhi*, A. I. R. 1973 Delhi, 112).

Error of law.—The section is not directed against conclusion of law or fact in which the question of jurisdiction is not involved. Error of law is by itself no ground for revision unless it either results in a failure or wrong exercise of jurisdiction or amounts to a material irregularity in the exercise of jurisdiction.

Where a decree is erroneous in the sense that some technical rule of law has been overlooked which could have been remedied the High Court does not ordinarily interfere in revision, but where there is a prohibition in a statute and a claim could not have been decreed according to law the High Court would not be justified in importing any abstract considerations of justice and overlooking the principle that justice should be administered according to law. (*Naubat Rai v. Jugal Kishore*, 1949 A. L. J. 102).

The powers of the High Court in revision are not available for correction of errors of law, however gross those errors may be, and whatever may be the result of those errors on the merits of the case. Errors of subordinate courts, however gross and palpable they may be, would escape correction in the Court of revision. The cause of justice has no place in the framework of the revisional power and cannot prevail. This power of the High Court is only available where the High Court could legitimately hold that the court below had exceeded its jurisdiction or had refrained from exercising a jurisdiction vested in it or it acted illegally or with material irregularity in the exercise of that jurisdiction, namely, committed such an error of procedure, a mandatory procedure, and the error had resulted in failure of justice or some such thing.

The jurisdiction of the High Court under S. 115, C. P. C., is a limited one. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.

Section 115 empowers the High Court to satisfy itself on three matters, (a) that the order of the subordinate court is within its jurisdiction; (b) that the case is one in which the Court ought to exercise jurisdiction; and (c) that

in exercising jurisdiction the Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. And if the High Court is satisfied on these three matters it has no power to interfere because it differs from the conclusions of the subordinate court on questions of fact or law. A distinction must be drawn between the errors committed by subordinate courts in deciding questions of law which have relation to, or are concerned with, questions of jurisdiction of the said court, and errors of law which have no such relation or connection. An erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that court, cannot be corrected by the High Court under S. 115. (*M. L. Sethi v. R. P. Kapur*, A. I. R. 1972 S. C., 2379).

The power of the High Court under S. 115 is exercisable in respect of 'any case which has been decided'. A case can be said to have been decided when any rights or obligations of the parties is adjudicated upon. By permitting a party to file evidence in the appeal, no court decides any question relating to right or obligation of the parties in controversy. Admission of evidence even in appeal does not decide any right of the parties. By evidence the truth of a fact which is submitted to investigation is established or disproved. That is the precise reason that a rule of evidence is defined as a principle which expresses the mode or manner of proving the fact and circumstances upon which a party relies to establish a fact in dispute. Hence by deciding to take evidence in the appeal, the court below cannot be said to have adjudicated upon any of the rights of the parties. The admission of additional evidence in the appeal cannot amount to case decided. Non-interference will not cause a denial of justice or irremediable harm to the applicant. The Supreme Court has observed in *Major S. S. Khanna v. F. J. Dhillon*, A. I. R. 1964 S. C. 497, that the exercise of jurisdiction under S. 115, C. P. C., is discretionary and that the court is not bound to interfere merely because the conditions in clauses (a), (b) and (c) of S. 115 are satisfied. The fact that another remedy is available to an aggrieved party by way of any appeal from the ultimate judgment or decree, is one of the relevant considerations for refusing to exercise the discretion under S. 115, C. P. C. [*Smt. Shanti Kaur v. Smt. Haseen Jahan Begum*, 1976 (2) A. I. R. 694.]

Discretionary order.—Again the exercise of revisional jurisdiction under this section is purely discretionary and even if the lower court has acted without jurisdiction or acted illegally in the exercise of jurisdiction, the High Court will not interfere if the result of an irregularity has been to promote justice. The powers will only be exercised for the prevention of injustice. Section 115 confers powers to be exercised with a view to subserve and not to defeat the ends of justice. Then, the revisional powers will not ordinarily be exercised so long as there is any other remedy available either by suit or appeal. The High Court will not interfere if another convenient remedy is open to the applicant. But it may interfere if such a course is necessary in the interests of justice.

There is always room for an honest difference of opinion as to whether a certain set of facts amounts to sufficient cause or not. The courts below must have the discretion to decide the question for themselves, and unless the court below travels beyond the limits within which discretion may be reasonably exercised, or, in other words, unless it can be said that it has taken a perverse

or absurd view, the exercise of the discretion by it will not be interfered with in appeal and much less in revision. (*Lala Hanuman Das v. Pirthvi Nath*, 1956 A. L. J. 367).

Although an appellate or revisional Court has unquestioned right to review or interfere with the orders of subordinate courts, it will not do so unless the subordinate court acted preversely or took a wrong view.

When it is said that a certain matter is in the discretion of the Court, what is really meant is that the Court has to apply the rule of reason and justice and not to act according to private or personal opinion; it is the law and not humour which guides the Court and the possessor of discretion must put his mind to the case and really use judgment in coming to a decision; he must not approach the matter with his mind as if already made up. Exercise of discretion must be legal and regular, not arbitrary, fanciful or vague. To command respect, discretion should be informed by traditions, methodised by analogy and disciplined by system. It is exercised largely on the facts and circumstances of a given case, with the result that ordinarily it is neither possible nor feasible to formulate a rigid formula capable of fitting all circumstances. (*Jogindar Singh v. Hardial Singh*, A. I. R. 1967 Punj. 385).

One of the purposes and objects of allowing amendment of the plaint is to avoid multiplicity of suits and the Court has discretion to allow an amendment; of course the discretion has to be used in a judicial manner. The considerations, which normally weigh with the Court, are whether the amendment can be allowed without working injustice to the other side and whether award of cost can compensate the opposite party. Normally the High Court does not interfere under S. 115, C. P. C., if the lower court in exercise of its judicial discretion allowed the amendment. (*Sardar Hari Bachan Singh v. Major S. Har Bhajan Singh*, A. I. R. 1975 Punjab and Haryana, 205).

Illegal or irregular order of lower court bringing out just result.—It is well established that the High Court is not bound to interfere under S. 115, C. P. C. except in aid of justice. Thus where the order of a subordinate court has brought about a just result and where the setting aside of that order would bring about an unjust result the High Court would not exercise its discretion under S. 115, C. P. C., and interfere with such order, even though the order suffers from an illegality or irregularity (*H. C. Suddappa Lakshamma*, A. I. R. 1965 Mys. 313).

Meaning of "Case decided".—The term "case decided" used in S. 115, C. P. C., is not equivalent of a suit or appeal decided. The word "case" is something wider but not wide enough to include every order passed by a court during the pendency of a suit. It would include a decision on any substantial question in controversy between the parties affecting their rights, even though such order be passed in the course of the trial of the suit. The decision of part of a case or purely an *ad interim* order that does not effectually dispose of the matter before the court would not be "case decided". A Full Bench of the Allahabad High Court has held that an order granting an application for leave to sue in *forma pauperis* is a "case decided" within the meaning of S. 115, C. P. C. and hence can be revised. (*Ramzan, Ali v. Satul Bibi*, I. L. R. 1947 All. 812).

Numerous cases of the various High Courts have taken different views in regard to the interpretation of the expression "case decided." The decisions of the Allahabad and Lahore High Courts had taken a narrower view. So did

the Rajasthan High Court. The other High Courts have taken a liberal view. The narrower view was canvassed for acceptance of the Supreme Court in *Major S. S. Khanna v. F. J. Dhillon*, A. I. R. 1964 S. C. 497, but it was not accepted. Repelling the narrower view, Shah, J. (as he then was) said at page 501 :

“The expression ‘case’ is a word of comprehensive import : it includes civil proceedings other than suits, and is not restricted by anything contained in the section to the entirety of the proceeding in a civil court. To interpret the expression ‘case’, as an entire proceeding only and not a part of proceeding would be to impose a restriction upon the exercise of powers of superintendence which the jurisdiction to issue writs, and the supervisory jurisdiction are not subject, and may result in certain cases in denying relief to an aggrieved litigant where it is most needed, and may result in the perpetration of gross injustice.”

A few years later, a question arose before the Supreme Court in *Baldevdas Shivlal v. Filmistan Distributors (India) Pvt. Ltd.*, A. I. R. 1970 S. C. 406 that if the expression “case” did not mean only the entire proceeding but also meant a part of the proceeding as held by that Court in the case of *Major S. S. Khanna*, A. I. R. 1964 S. C. 497, then could it lead to the conclusion that every interlocutory order of the Court, if it suffers from an infirmity of error of jurisdiction, should be taken to be a case decided so as to clothe the High Court with the power of interference. The question was answered in the negative and Shah, J. (as he then was) said at page 410 :

“A case may be said to be decided, if the Court adjudicates for the purposes of the suit some right or obligation of the parties in controversy ; every order in the suit cannot be regarded as a case decided within the meaning of S. 115 of the Code of Civil Procedure.” (*Rangulam Choudhary & others v. Nawin Choudhary & others*, A. I. R. 1972 Patna 499).

The expression ‘case’ is not limited in its import to the entirety of the matter in dispute in an action. As already stated, the Supreme Court observed in *Major S. S. Khanna v. Brig. F. J. Dhillon*, [(1964) 4 S. C. R. 409], that the expression ‘case’ is a word of comprehensive import ; it includes a civil proceeding and is not restricted by anything contained in S. 115 of the Code to the entirety of the proceeding in a civil court. To interpret the expression ‘case’ as an entire proceeding only and not a part of the proceeding imposes an unwarranted restriction on the exercise of powers of superintendence and may result in certain cases in denying relief to the aggrieved litigant where it is most needed and may result in the perpetration of gross injustice. But it was not decided in *Major S. S. Khanna’s* case that every order of the Court in the course of a suit amounts to a case decided. As stated above, a case may be said to be decided, if the court adjudicates for the purposes of the suit some right or obligation of the parties in controversy ; every order in the suit cannot be regarded as a case decided within the meaning of S. 115 of the Code of Civil Procedure. (*Baldevdas Shivlal v. Filmistan Distributors, (India) Pvt. Ltd.*, 1970 I. S. C. J. 342).

Before the High Court can entertain a revision, the order must amount to a decision of a case and an order which a court can itself change at any time cannot be termed an order which decides a case. (*Ramrichpal Singh v. Dayanand Sarup*, 1955 A. L. J. 187).

An order of remand passed under O. 41, r. 23, constitutes a case decided

within S. 115, C. P. C. (*Mata Prasad Pandey v. Ram Adhar Pandey*, 1952 A. L. J. R. 187).

Where only one issue in the suit has been decided but the result of the order of the court below is that a part of the claim has gone out of the suit then with respect to this part it cannot be said that no case has been decided within the meaning of S. 115, C. P. C., and a revision lies from such a decision. (*Bhishambar Dayal v. Lala Girdhar Lal*, 1952 A. L. J. R. 697).

An order holding that the arbitration clause did not apply to the dispute in suit and directing that the suit should proceed is not appealable nor is it a case decided and revisable under S. 115, C. P. C. Once the question whether the suit is maintainable has been raised and becomes an issue, the decision does not result in the termination of the suit and cannot be revised under S. 115, C. P. C. (*State of U. P. v. Abdul Aziz*, 1955 A. L. J. R. 624).

As already said, the expression "case" is a word of comprehensive import : it includes civil proceeding other than suits, and is not restricted by anything contained in the section to the entirety of the proceeding in a civil court. To interpret the expression "case" as an entire proceeding only and not a part of a proceeding would be to impose a restriction upon the exercise of powers of superintendence which the jurisdiction to issue writs, and the supervisory jurisdiction are not subject, and may result in certain cases in denying relief to an aggrieved litigant where it is most needed, and may result in the perpetration of gross injustice.

That is not to say that the High Court is obliged to exercise its jurisdiction when a case is decided by a subordinate court and the conditions in cls. (a), (b), or (c) are satisfied. Exercise of the jurisdiction is discretionary ; the High Court is not bound to interfere merely because the conditions are satisfied. The interlocutory character of the order, the existence of another remedy to an aggrieved party by way of an appeal, from the ultimate order or decree in the proceeding or by a suit, and the general equities of the case being served by the order made are all matters to be taken into account in considering whether the High Court, even in cases where the conditions which attract the jurisdiction exist, should exercise its jurisdiction. (*S. S. Khanna v. F. J. Dillon*, 1963 A. L. J. 1068, S. C.).

If an appeal lies against the adjudication directly to the High Court or to another court from the decision of which an appeal lies to the High Court, it has no power to exercise its revisional jurisdiction, but where the decision itself is not appealable to the High Court, directly or indirectly, exercise of the revisional jurisdiction by the High Court would not be deemed excluded. (*S. S. Khanna v. F. J. Dhillon*, 1963 A. L. J. 1068, S. C.).

Wrong exercise of jurisdiction.—Where a court has acted by inventing a rule of procedure for itself which is not warranted by law, the High Court is not only competent to interfere but should interfere in its revisional jurisdiction. (*Dip Chand v. Sheo Prasad*, 27 A. L. J. 769). So the High Court can interfere where a civil court has wrongly entertained a suit cognisable by a revenue court (*Tajammal Hussain v. Ali Bahadur Khan*, 56 I. C. 946), or where the lower court has exercised a jurisdiction not vested in it by law under a misconception of the law of limitation.

Declining jurisdiction.—An order declining to exercise jurisdiction will be interfered with by the High Court in revision.

Illegally or with material irregularity.—The High Court will not interfere with an incorrect decision of the lower court where there is no question of lack of jurisdiction or material irregularity in procedure. If the lower court had jurisdiction to decide the question before it and there is no irregularity or illegality in the exercise of that jurisdiction its decision is not open to revision even if it is a wrong decision. (*Majbool Bahadur v. Partap Bhan Prakash Singh*, 1944 O. W. N. 440).

The words 'illegality' and 'material irregularity' in S. 115 do not cover either errors of fact or of law. These words do not refer to the decision arrived at but to the manner in which it is reached. The errors as contemplated relate to material defects of procedure. (*Radhaballav Nath Endowment v. Fakir Pradhan*, A. I. R. 1965 Orissa, 221). Where the lower appellate court did not express an opinion upon a matter which it was not invited to consider it cannot be said to have acted illegally within the meaning of S. 115 of the Code. (*Shrimati Jagwati v. Shrimati Bhagwati Devi*, 1955 A. L. J. 152).

If the court below has exercised its jurisdiction in the prescribed way but its decision is based upon erroneous conclusions of facts or law, it cannot be said to have acted illegally or with material irregularity in the exercise of its jurisdiction. If the court below had jurisdiction to decide the question before it and there is no irregularity or illegality in the exercise of that jurisdiction, its decision is not open to revision even if it is a wrong decision. (*Janki Prasad Singh v. Sheo Pujan*, 1949 A. L. J. 511).

Section 115 (c) of the Code applies when the court 'acts' illegally or with material irregularity in exercise of its jurisdiction. It cannot apply to cases where the court merely comes to a wrong decision on a question of fact or of law. The sub-section is limited to that class of cases where the court having jurisdiction violates any rule of law or procedure prescribing the mode in which such jurisdiction is to be exercised. Section 115 (c) does not provide for revision of wrong decisions of law if those decisions are not vitiated by any 'act' of the court which is illegal or materially irregular. (*Abdul Majid v. Daleep Singh*, 1949 A. L. J. 216).

There is no justification for the view that clause (c) of S. 115 is intended to authorise the High Court to interfere and correct gross and palpable errors of subordinate courts so as to prevent gross injustice in non-appealable cases. It only applies to cases in which no appeal lies, and where the legislature has provided no right of appeal the manifest intention is that the order of the trial court, right or wrong, shall be final. The section empowers the High Court to satisfy itself upon three matters, viz., (a) that the order of the subordinate court is within its jurisdiction, (b) that, the case is one in which the court ought to exercise jurisdiction and (c) that in exercising jurisdiction the court has not acted illegally, that is in breach of some provision of law, or with material irregularity. If the High Court is satisfied upon those three matters, it has no power to interfere because it differs, however profoundly, from the conclusions of the subordinate court upon questions of fact or law. (*Venkatagiri Ayyangar v. The Hindu Religious Endowments Boards Madras*, A. I. R. 1949 P. C. 159). Where there is a wilful disregard or conscious violation of a rule of law or procedure the case is one of material irregularity calling for interference in revision. (*Motibhai Jesingbhai Patel v. Ranchodbhai Shambhubhai Patel*, 59 Bom. 430). Where the court below did not at all apply its mind to the relevant provisions of an enactment, it has been held that there was material irregularity in the exercise of its jurisdiction by the

court and a revision lay to the High Court under S. 115 of the Code. [*Khun Khun Chaube v. Mahabir Chaube*, 1948 A. L. J. 90 (F. B.)].

While exercising the jurisdiction under S. 115, C. P. C., it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. The words "illegally" and "with material irregularity" as used in cl. (c) do not cover either errors of fact or of law; they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decisions, and not to errors either of fact or of law. [*Messrs D. L. F. Housing and Construction Co. (P.) Ltd. v. Sarup Singh*, 1971 (1) S. C. J. 108].

Clause (c) is not confined in its application to defects in procedure alone and it would still be open to the High Court to interfere in revision with decisions involving illegality as distinguished from mere errors of law or fact. Illegality means something in breach of some provision of law. (*Narshiprasad v. Vidutray*, A. I. R. 1954 Sau. 66).

Mistake does not confer jurisdiction.—A mistake committed by a party does not confer jurisdiction on court. Where a court having jurisdiction exercises it in an irregular manner due to a mistake of the parties, there is no ground for interference in revision. (*Chaudhary Raghunandan Singh v. Narain Das Bal Kishun Das*, 1960 A. L. J. 220).

Power of interference in revision.—It could not be laid down as a general proposition that the High Court has no power of interference at all or should not interfere in revision where there is an other remedy by way of a suit open to the applicant. The provision that a regular suit may be filed under O. 21, r. 63, C. P. C. after an objection filed under O. 21, r. 58, has been disposed of, does not therefore bar the consideration of the propriety of the decision by the court below under S. 115, C. P. C. (*P. N. Singh v. Rang Nath*, 1960 A. L. J., 79).

Appeal.—An appeal can be converted into an application for revision under S. 115, C. P. C.

Interlocutory Orders.—No revision lies against interlocutory orders which are appealable. As regards non-appealable interlocutory orders, there is a conflict of decisions as to whether they can be revised under S. 115, C. P. C. The words used in the section are "case decided", and the conflict turns on the meaning of this expression, as to whether it includes an issue or part of a case. The earlier view of the Allahabad High Court. (*Buddhu Lal v. Mewa Ram*, 43 All. 564, F. B.) and the Lahore High Court (*Lal Chand Mangal Sen v. Beharilal Mchar Chand*, 5 Lah. 288) was that the word "case" does not include an issue or part of a case and accordingly an interlocutory order was not revisable. But in later pronouncements the trend of decision is that although the general rule is against such interference, the High Court can interfere in revision with an interlocutory order where the court below has acted perversely or in a manner as to cause irreparable loss to the party which cannot be remedied otherwise than by the exercise of the extraordinary jurisdiction of the High Court at that stage. The other High Courts have consistently taken the view that the word "case" is wide enough to include an interlocutory order, and the High Court has power to revise an interlocutory

order of the courts below in which the conditions of clauses (a), (b) or (c) of S. 115, C. P. C. are satisfied. The Calcutta High Court has gone to the length of holding that the High Court has ample jurisdiction to revise interlocutory orders and to set them aside, although such orders may be attacked in an appeal from the final decree or order in the proceeding. (*Salam Chand Kannyaram v. Bhagwan Das Chilama*, 53 Cal. 767).

DISTINCTION BETWEEN

1. Revision and Review of Judgment

1. The power of revision is exercised by the court superior to the court which decides the case but the power of review is exercised by the very court which passed the decree or order.

2. The power of revision is conferred on the High Court only while it is not so in the case of review. Any court can review its judgment.

3. Revisional powers by the High Court can be exercised only in a case when there is no appeal to the High Court, but review can be made even when appeal lies to the High Court therein.

4. The grounds on which the powers of revision and review can be exercised are different. The grounds for revision relate to jurisdiction, viz., want of jurisdiction, failure to exercise a jurisdiction or illegal or irregular exercise of jurisdiction, while the grounds for review may be (a) the discovery of new and important matter or evidence, (b) some apparent mistake or error on the face of the record, or (c) any other sufficient reason.

5. In revision the High Court can of its own accord send for the case, but for review an application has to be made by the aggrieved party.

6. No appeal lies from an order made in the exercise of revisional jurisdiction, but the order granting review is appealable.

2. Appeal and Reference

1. A right of appeal is a right conferred on the suitor, while the power of reference is vested in the court.

2. Reference is always made to the High Court, while an appeal is preferred to a superior court which need not necessarily be a High Court.

3. The grounds of appeal are wider than the grounds of reference.

4. Reference is made pending a suit, appeal or execution proceeding in order to enable the court to arrive at a correct conclusion, while an appeal is preferred after the decree is passed or an appealable order is made.

3. Appeal and Revision

1. An appeal lies to a superior court, which may not necessarily be a High Court, but an application for revision lies only to the High Court.

2. An appeal lies only from appealable orders and decrees, but an application for revision can be made only when the relief by way of appeal to the High Court is not available.

3. A right of appeal is a substantive right given by statute. There is

no right of revision. It is only a privilege. A party may move the High Court to invoke its revisional jurisdiction or the High Court may of its own motion exercise revisional jurisdiction, but this power is discretionary.

4. An appeal abates if the legal representatives of a deceased party are not brought on the record within the time allowed by law. A revision does not abate in case of the death of a party even if legal representatives are not brought on the record. The High Court has a right to bring the proper parties before the Court at any time.

5. The grounds of appeal and revision are different. An application in revision can lie only on the ground of jurisdiction, and the High Court in exercise of its revisional jurisdiction is not a court of appeal on a question of law or fact. In an appeal the court has the power to decide both questions of fact and law.

6. Section 115 does not require that there should be an application in revision. The High Court can move of its own accord in exercising revisional jurisdiction. In case of appeal there must be a memorandum of appeal filed before the same can be considered by the appellate court.

4. Second Appeal and Revision

1. A second appeal lies to the High Court only when the decision of the lower court is contrary to law or to some usage having the force of law or fails to determine some material issue of law or usage having the force of law, or involves a substantial error or defect in procedure. The grounds of revision are, however, different. They relate to jurisdiction.

2. The revisional powers of the High Court can be invoked in case in which no appeal or second appeal lies to the High Court. This is not so in second appeal.

3. The High Court will not in its revisional jurisdiction enter into the merits of the case however erroneous the decision of the lower court is on an issue of law or of fact but will interfere only to see that the requirements of law have been properly obeyed by the court whose order is the subject of revision. Although no second appeal can be preferred on questions of fact, yet, when such an appeal is already before the High Court, it may determine issues of fact where such issues have not been determined by the lower appellate court or have been wrongly determined, provided the evidence on the the record is sufficient for such determination. The power of interference in revision is much more limited than that in the case of second appeals.

4. In revisional matters the High Court may decline to interfere if it is satisfied that substantial justice has been done. But, on questions of law in second appeal, no discretion vests in the High Court and it has no right to decide merely on equitable grounds.

5. Reference and Revision

1. In reference the case is referred to the High Court by a Court subordinate to it. On the other hand, in revision the party aggrieved moves the High Court for the exercise of its revisional jurisdiction, or the High Court may *suo motu* send for the case and examine the record.

2. The ground for reference is the entertainment of some reasonable doubt by the court trying the suit, appeal or executing the decree with regard to a question of law or usage having the force of law. The ground for revision, on the other hand, relates to jurisdiction, viz., want of jurisdiction, failure to exercise a jurisdiction or illegal or irregular exercise of jurisdiction.

6. Reference and review

1. In reference the subordinate court refers the case to the High Court, while in review an application is made by the aggrieved party.

2. The High Court alone can decide matters on reference, while an application for review is made to the court which passed the decree or made the order.

3. Reference is made during the pendency of a suit, appeal or execution proceedings, while an application for review is made to the court after it has passed the decree or made the order.

4. The grounds for reference and review are different. Reference is made by the court trying the suit, appeal or executing the decree when it entertains reasonable doubt with regard to any question of law or usage having the force of law. The grounds for review may be the discovery of new and important matter or evidence, some apparent mistake or error on the face of the record, or any other sufficient reason.

7. Review and Appeal

1. An application for review lies to the same court while an appeal lies to a higher court.

2. The main object of granting a review of judgment is reconsideration of the same matter by the same judge, while an appeal is heard by another judge.

3. The grounds for review are narrower than the grounds of appeal.

4. There is no second review, but there is second appeal on a substantial question of law.

PART IX

SPECIAL PROVISIONS RELATING TO THE HIGH COURTS NOT BEING THE COURT OF A JUDICIAL COMMISSIONER

[Ss. 116—120]

116. Part to apply only to certain High Courts.--This part applies only to High Courts not being the Court of a Judicial Commissioner.

117. Application of Code to High Courts.--Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts.

118. Execution of decree before ascertainment of costs.--Where any such High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs ;

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

119. Unauthorised person not to address Court.--Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys.

120. Provisions not applicable to High Court in original civil jurisdiction.--The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20.

PART X

RULES

[Ss. 121—131]

Part X deals with Rules conferring rule-making powers on the High Courts for the purpose of regulating the proceedings in civil cases and constitution of Rule Committees in various states.

121. Effect of rules in First Schedule.—The rules in this First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part.

122. Power of certain High Courts to make rules.—High Courts not being the Court of a Judicial Commissioner may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule.

123. Constitution of Rule Committees in certain States.—(1) A Committee, to be called the Rule Committee, shall be constituted at the town which is the usual place of sitting of each of the High Courts referred to in S. 122.

(2) Each such Committee shall consist of the following persons, namely :

(a) three Judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or a Divisional Judge for three years,

(b) two legal practitioners enrolled in that Court,

(c) a Judge of a Civil Court subordinate to the High Court,
and

(d) in the towns of Calcutta, Madras and Bombay, an attorney.

(3) The members of each such Committee shall be appointed by the High Court, who shall also nominate one of their number to be President :

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the High Court in this behalf ; and whenever any member retires, resigns, dies or ceases to reside in the State in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said High Court may appoint another person to be a member in his stead.

(5) There shall be a Secretary to each such Committee, who shall be appointed by the Chief Justice or Chief Judge and shall receive such remuneration as may be provided in this behalf by the State Government.

124. Committee to report to High Court.—Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under S. 122 the High Court shall take such report into consideration.

125. Power of other High Courts to make rules.—High Courts, other than the Courts specified in S. 122, may exercise the powers conferred by that section in such manner and subject to such conditions as the State Government may determine :

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court.

126. Rules to be subject to approval.—Rules made under the foregoing provisions shall be subject to the previous approval of the Government of the State in which the Court whose procedure the rules regulate is situate or, if that Court is not situate in any State, to the previous approval of the Central Government.

127. Publication of Rules.—Rules so made and approved shall be published in the Official Gazette, and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule.

128. Matters for which rules may provide.—(1) Such rules shall be not inconsistent with the provisions in the body of this Code but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1), such rules may provide for all or any of the following matters, namely :—

(a) the service of summonses, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service ;

(b) the maintenance and custody, while under attachment, of live-stock and other movable property, the fees payable for such maintenance and custody, the sale of such live-stock and property, and proceeds of such sale ;

(c) procedure in suits by way of counter-claim, and the valuation of such suits for the purposes of jurisdiction ;

(d) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts ;

(e) procedure where the defendant claims to be entitled to contribution or indemnity over/against any person whether a party to the suit or not ;

(f) summary procedure—

(i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising—

on a contract express or implied ; or

on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty ; or

on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only ; or

on a trust ; or

(ii) in suits for the recovery of immovable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant ;

(g) procedure by way of originating summons ;

(h) consolidation of suits, appeals and other proceedings ;

(i) delegation to any Registrar, Prothonotary or Master or other official of the Court of any judicial, quasi-judicial and non-judicial duties ; and

(j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts.

129. Power of High Courts to make rules as to their original civil procedure.—Notwithstanding anything in this Code, any High Court (not being the Court of a Judicial Commissioner) may make such rules not inconsistent with the Letters Patent or order or other law establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

130. Power of other High Courts to make rules as to matters other than procedure.—A High Court not being a High Court to which S. 129 applies may, with the previous approval of the State Government, make with respect to any matter other than procedure any rule which a High Court for a State might under Article 227 of the Constitution make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a presidency-town.

131. Publication of rules.—Rules made in accordance with S. 129 or S. 130 shall be published in the Official Gazette and shall from the date of publication or from such other date as may be specified have the force of law.

PART XI MISCELLANEOUS

(Ss. 132—158)

Sections 132 and 133, which provide for exemption of certain persons from personal appearance in court, and Ss. 135 and 135-A, which deal with exemptions from arrest under civil process, have already been adverted to at appropriate headings in Parts I and II of the book. They are, however, mentioned here for facility of reference.

132. Exemption of certain women from personal appearance.—(1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court.

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code.

133. Exemption of other persons.—(1) The following persons shall be entitled to exemption from personal appearance in Court, namely :—

- (i) the President of India ;
- (ii) the Vice-President of India ;
- (iii) the Speaker of the House of the People ;
- (iv) the Ministers of the Union ;
- (v) the Judges of the Supreme Court ;
- (vi) the Governors of States and the Administrators of Union territories ;
- (vii) the Speakers of the State Legislative Assemblies ;
- (viii) the Chairmen of the Legislative Councils ;
- (ix) the Ministers of States ;
- (x) the Judges of the High Courts ; and
- (xi) the persons to whom S. 87-B applies,

(2)

* * *

(3) Where any person claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs.

“Former Indian State” under S. 87-B means any such Indian State as the Central Government may, by notification in the Official Gazette, specify for the purposes of this section. “Ruler” in relation to a former Indian State, has the same meaning as in Art. 363 of the Constitution, and includes the Prince, Chief or other person recognised before the Constitution by His Majesty or the Government of the Dominion as the Ruler of any Indian State.

134. Arrest other than in execution of decrees. - The provisions of Ss. 55, 57 and 59 shall apply, so far as may be, to all persons arrested under this Code.

135. Exemption from arrest under civil process.—(1) No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court.

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue agents and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal.

(3) Nothing in sub-section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution or where such judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree.

135-A. Exemption of members of legislative bodies from arrest and detention under civil process.—No person shall be liable to arrest or detention in prison under civil process —

(a) if he is a member of—

(i) either House of Parliament, or

(ii) the Legislative Assembly or Legislative Council of a State, or

(iii) a Legislative Assembly of a Union territory, during the continuance of any meeting of such House of Parliament or, as the case may be, of the Legislative Assembly or the Legislative Council ;

(b) if he is a member of any committee of—

(i) either House of Parliament, or

(ii) the Legislative Assembly of a State or Union territory,
or

(iii) the Legislative Council of a State,
during the continuance of any meeting of such committee ;

(c) if he is a member of—

(i) either House of Parliament, or

(ii) a Legislative Assembly or Legislative Council of a
State having both such Houses,

during the continuance of a joint sitting, meeting, conference
or joint committee of the Houses of Parliament or Houses of
the State Legislature, as the case may be ;

and during the forty days before and after such meeting, sitting
or conference.

(2) A person released from detention under sub-section (1)
shall, subject to the provisions of the said sub-section, be liable
to re-arrest and to the further detention to which he would have
been liable if he had not been released under the provisions of
sub-section (1).

136. Procedure where person to be arrested or property to be attached is outside district.—(1) Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

(2) The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before

the latter Court or for satisfying any decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him.

(4) Where a person to be arrested or movable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in West Bengal or at Madras or at Bombay, the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras or Bombay, as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court.

137. Language of subordinate Courts.—(1) The language which, on the commencement of this Code, is the language of any Court subordinate to a High Court shall continue to be the language of such subordinate Court until the State Government otherwise directs.

(2) The State Government may declare what shall be the language of any such Court and in what character applications to and proceedings in such Courts shall be written.

(3) Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court, such writing may be in English ; but if any party or his pleader is unacquainted with English a translation into the language of the Court shall, at his request, be supplied to him ; and the Court shall make such order as it thinks fit in respect of the payment of the costs of such translation.

138. Power of High Court to require evidence to be recorded in English.—(1) The High Court may, by notification in the official Gazette, direct with respect to any Judge specified in the notification, or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall be taken down by him in the English language and in manner prescribed.

(2) Where a Judge is prevented by any sufficient reason from complying with a direction under sub-section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court.

139. Oath on affidavit by whom to be administered. In the case of any affidavit under this Code—

(a) any Court or Magistrate, or

(aa) any notary appointed under the Notaries Act, 1952, or

(b) any officer or other person whom a High Court may appoint in this behalf, or

(c) any officer appointed by any other Court which the State Government has generally or specially empowered in this behalf; may administer the oath to the deponent.

140. Assessors in causes of salvage, etc.—(1) In any admiralty or vice-admiralty cause of salvage, towage or collision, the Court, whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall, upon request of either party to such cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors; and such assessors shall attend and assist accordingly.

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed.

141. Miscellaneous Proceedings.—The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

Explanation.—In this section, the expression 'proceedings' includes proceedings under O. IX, but does not include any proceeding under Art. 226 of the Constitution.

142. Orders and notices to be in writing.—All orders and notices served on or given to any person under the provisions of this Code shall be in writing.

143. Postage.—Postage, where chargeable on a notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed before the communication is made :

Provided that the State Government may remit such postage, or fee, or both, or may prescribe a scale of court-fees to be levied in lieu thereof.

RESTITUTION

[S. 144]

Restitution, as laid down in S. 144, C. P. C., means restoring to a party on the variation or reversal of a decree or order, of what has been lost to him in execution of the decree or order or directly in consequence of that decree

or order. It is the sacred duty of the State to restitute the property wrongly taken away from a law abiding citizen after the successful party has vindicated its rights.

The granting of restitution is not discretionary. The court is bound to place the parties in the position which they would have occupied but for the decree appealed from. In other words, restitution can be demanded not as a matter of favour but as a matter of right. The wording of S. 144 is imperative and the court shall cause restitution to be made where the order has been reversed.

The principle embodied in the doctrine is that on the reversal of a decree in appeal the law imposes an obligation on the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost. The loss sustained must be properly consequential and includes cost and interest, damages, compensation and mesne profits. This obligation arises automatically on the reversal or modification of this decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree and the court in making restitution is bound to restore the parties, so far as they can be restored, to the same position they were in at the time when the court by its erroneous action had displaced them from.

Section 144 of the Code which deals with restitution reads :

144. Application for restitution.—(1) Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified ; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation, reversal, setting aside or modification of the decree or order.

Explanation.—For the purposes of sub-section (1), the expression “Court which passed the decree or order” shall be deemed to include,—

(a) where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the Court of first instance ;

(b) where the decree or order has been set aside by a separate suit, the Court of first instance which passed such decree or order ;

(c) where the Court of first instance has ceased to exist or has ceased to have jurisdiction to execute it, the Court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

Section 144 enables the successful party to be placed in *status quo ante* and empowers the court to order restitution when a decree or an order is varied or reversed in any appeal, revision or other proceeding. There was however a conflict of judicial opinion as to whether the provisions of S. 144 applied to cases also where a decree was set aside or modified otherwise than on an appeal. The amendment made in S. 144 clarifies the position that it is applicable to such cases also where a decree is set aside or modified otherwise than on an appeal.

Under the Code of Civil Procedure (Amendment) Act 1956, the benefit of S. 144 has been enlarged so as to comprise within its orbit not only a decree but also an order, with the result that upon the ultimate reversal or variation of a judgment or order the section enjoins that the court of first instance shall on the application of the party concerned cause restitution to be made so as to place the parties in the position which they would have occupied but for the erroneous judgment or order.

Requisite conditions for the applicability of restitution.—The following conditions are, therefore, necessary for the application of restitution :

1. The restitution sought must be in respect of that decree or order which had been varied or reversed ; ✓

2. The applicant has lost, or been deprived of, something by reason of the decree or order which has been subsequently varied or reversed ; ✓

3. The party applying for restitution must be entitled to a benefit under a reversing decree or order ; ✓

4. The relief claimed must be properly consequential on such variation of the decree or order ; and ✓

5. The applicant must be a party to the litigation which has terminated according to law. ✓

If the aforesaid conditions are satisfied, it gives no choice or discretion to the Court, and the only course it has to follow is to order restitution to the party which had suffered loss on account of the erroneous decree or order.

Section 144, Civil Procedure Code, imposes no limitations on the rights of the judgment-debtor to get back the benefit, to which he is entitled under the appellate Court's decree, which has reversed or varied the trial Court's decree. On a perusal of S. 144, it is obvious that the question whether the balance of convenience is in his favour or not, is irrelevant for the purpose of

granting restitution. (*Ganesh Prasad v. Adi Hindu Social Service League*, 1 An. W. R. 203).

Section 144 would apply whenever the decree is reversed or varied howsoever the variance or reversal thereof is effected. It also applies to cases where the decree or order is varied or reversed in a proceeding in the same suit by the same Court, for example where an *ex parte* decree is set aside under r. 13 of O. 9.

The doctrine of restitution is based on the principle that the first and highest of the duties of all the Courts is to take care that the act of the Court does no injury or wrong to the suitors. The duty or jurisdiction of the Court to grant restitution is inherent in the general jurisdiction of the Courts to act fairly and rightly in the circumstances towards all parties involved. (*S. M. Deshmukh v. Ganesh Krishnaji Khare*, A. I. R. 1975 Bom. 82).

Illustration.—A obtains a decree against B for possession of immovable property and in execution of the decree obtains possession of the property. The decree is subsequently reversed in appeal. B is entitled on an application under this section to restitution of the property, though there may be no direction for restitution in the decree of the appellate court, together with mesne profits for the period during which A remained in possession.

Broadly speaking, restitution is the right of a party to being placed in the same position which he occupied before the decree or order which has subsequently been varied or reversed was executed. Suppose a landlord files a suit for ejectment against his tenant. The suit is decreed *ex parte* and in execution of this *ex parte* decree the tenant is ejected and the landlord is put in possession. Subsequently, the *ex parte* decree is set aside. The tenant can certainly without waiting for the final decision in the suit apply for being put back in possession, *i e.*, being placed in the same position which he occupied before he was ejected in execution of the *ex parte* decree which has subsequently been set aside. It is so because the very setting aside of the *ex parte* decree entitles the tenant to be put back in possession. (*Gangadhar v. Raghubar Dayal*, 1974 A. L. J., 751, F. B.).

Application for restitution.—An application under S. 144 can be made before the court which passed the decree or order and cannot be made before the court to which the execution of the decree is transferred by that court.

The decision granting or refusing restitution is a decree within the meaning of S. 2 (2) and as such is appealable. A second appeal also lies.

A decree may be “varied or reversed” in various ways and these words used in S. 144 are equally applicable to a case where the decree has been set aside or varied not by a superior court on appeal or revision but by the same court or some other court of concurrent jurisdiction where grounds for variation or reversal exist. (*Jogendra Nath Singh v. Hira Sahu*, I. L. R. 1948 All. 62). Restitution may be granted even where the decree is set aside on review. (*Collector of Merrut v. Kalka Prasad*, I. L. R. 28 All. 665).

Application for restitution is to be made to the court which passed the original decree or order, *viz.*, the court of first instance.

Object.—Section 144 is so framed as to enable the successful party to be placed in *status quo ante*. (*Prag Narain v. Kamokhia Singh*, I. L. R. 31 All. 551, P. C.). As stated above, it enjoins that as far as possible the position

which the judgment-debtor and the decree-holder would have occupied under the amended decree should be made available to them. If the possession of property by a party has been disturbed by an order or decree of the court which has been varied or reversed, it is unquestionable that the party is entitled to be put back to the same position as he had held previous to the disturbance of his possession: And the duty and the jurisdiction of the court in directing restitution is to place the parties in the position which they would have occupied but for the act of the court. It is the duty of the court to see that the act of the court—meaning thereby not only primary or any intermediate court of appeal but the act of the court as a whole from the lowest court which entertains jurisdiction over the subject-matter to the highest court which finally disposes of the suit—does no injury to any of the suitors. The section should be liberally construed, the object being to shorten litigation and to afford a speedy and simple remedy. The principle of restitution is not restricted by the exact words of S. 144, C.P.C.

The doctrine of restitution is that on the reversal of a judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and it is the duty of the court to enforce that obligation unless it is shown that restitution would be clearly contrary to the real justice of the case. [*Lal Bhagwati Singh v. Lala Shri Kishan Das*, 1953 A. L. J. 249 (S. C.)].

In proceedings for restitution the Court has to consider the equities arising in the case and the demand for justice that the rights of both the rival parties make; and to pass such an order as will do justice to both the parties. The *status quo ante* is not to be achieved blindly. Such relief has to be given as is properly consequential on the reversal or variation of the decree or order. To find the appropriate relief the court has to see that the party applying for restitution is entitled to a benefit under the reversing decree and that such benefit has not been extinguished or mitigated by reason of supervening events which have either changed the subject-matter of the benefit or its character and incidents. [*Minto Lal v. Naraindas*, 1966 A. L. J. 510].

The term 'decree' covers an order. The section in terms also does not state or require that the applicant must be a party to the proceeding which has resulted in the original decree being reversed or varied; nor does it require that the final decree should provide for a right in him to apply for restitution. (*Gurunath Khandappagauda Patil v. Venktesh*, I.L.R. 1937 B 150).

The language of S. 144, C. P. C. does not expressly rule out the case of a decree which has been varied or reversed by the same court. The section seems to be couched in very general terms and there is nothing in it to rule out the case of such a decree from the purview of that section by necessary implication. [*Allahabad Theatres, Ltd., Allahabad v. Ram Sajiwan Misra*, I. L. R. (1949) All. 313].

The court has jurisdiction to order restitution under S. 144 even if the decree is modified or reversed by a court of coordinate jurisdiction in a separate unit. (*Jai Barhan v. Kedar Nath Marwari*, 49 I. A. 351).

Mesne Profits.—The court is competent to make orders as to mesne profits consequent upon an order for restitution and cannot refer the party to a separate suit.

Restitution, conceived in the light of doing justice between the parties, will necessarily have to depend on the facts and circumstances of each case

and cannot be reduced to the form of an inflexible rule that courts should have regard only to detriment suffered by one party and not to the position of the other. The granting of restitution under S. 144, C. P. C., should be consistent with justice to both parties. Where a sum of money is deposited in court to answer a decree but a restriction is placed to the unconditional withdrawal of the same, in terms of the decree, by reason of which the decree-holder is either unable or unwilling to obtain the use of the money, in such a case it cannot be taken as an invariable rule that the decree-holder should pay interest on the amount lying in court on the reversal of the trial court's decree in appeal. (*Pappu Reddiar v. P. S. V. Rm. Ramanatha Iyer*, A. I. R. 1963 Mad. 45).

Where possession over the plots was with the *supardar* appointed in proceedings under S. 146, Cr. P. C. and his possession was to enure for the benefit of the person in whom the title to the plots vested and the respondents were not in possession over the said plots either on the date when the *ex parte* decree was passed or on the date when the appellants took possession over the plots in consequence of such decree, it was held that the respondents could claim to be put back in possession only when a declaration contrary to or in variance of that which had been granted by the *ex parte* decree in favour of the appellants was subsequently granted in favour of the respondents. (*Gangadhar and others v. Raghubar Dayal and others*, 1974 A. L. J. p. 751, F. B.).

Parties. - A *bona fide* stranger purchaser is not affected by the reversal of the decree in the appeal. (*Mani Lal v. Ganga Prasad*, A. I. R. 1951 Alld. 832].

Forum.—Proceedings for restitution are not to be deemed to be proceedings in execution, but are to be treated as miscellaneous cases arising out of the suit. Hence jurisdiction of the court to try the original suit will determine its jurisdiction to try the miscellaneous case. (*Kiran Shashi Debi v. Chandra Bhushan Mandal*, I. L. R. (1951) 2 Cal. 315].

Restitution is not execution. The court of first instance mentioned in S. 144 really means the court which is competent to set matters right by granting restitution in the manner and to the extent that is proper under the circumstances. The court within whose jurisdiction the property delivered and to be redelivered is situate has jurisdiction to grant restitution, though it is not the court which passed the decree. (*Ithach Joseph v. Unni Kalliani*, I. L. R. 1954 T. C. 346).

Restitution under inherent powers.—Section 144 is not exhaustive of the principles of restitution. It is inherent in the general jurisdiction of the court to act rightly and fairly according to the circumstances towards all parties involved and for the purpose of preventing injustice under S. 151, C. P. C. But if a party is not entitled to take his stand upon the statute itself, it is a matter of discretion with the court to grant or refuse the relief in exercise of its inherent jurisdiction under S. 151. An order for restitution under S. 151, unlike an order under S. 144, is not appealable.

It is really the duty of the Court to grant restitution under its inherent powers when a person has been deprived of his property due to an order of the Court which has subsequently been varied or reversed as being erroneous. (*Gangadhar v Raghubar Dayal*, 1974 A. L. J. 751, F. B.).

The provisions of S. 144, C. P. C., are not exhaustive and the Court has inherent power to restore any party which has suffered any injury by virtue of any order passed by the Court to the position which it would have occupied if the wrong order had not originally been passed by the Court. This was the view taken by the Privy Council in *Prag Narain v. Kamakhia Singh*, (1919) I. L. R. 31 All. 551 (P. C.) and was followed by the Lahore High Court in *Sohnun v. Mast Ram*, A. I. R. 1929 Lah. 657. The same view was taken by the Madras High Court in *S. Chokalingam v. N. S. Krishna*, A. I. R. 1964 Mad. 404, the Calcutta High Court in *Jotindra Nath v. Jugal Chandra*, A. I. R. 1966 Cal. 637 and the Jammu & Kashmir High Court in *Subhash Chander v. Bodh Raj*, A. I. R. 1969 J. & K. 8.

On the authority of these cases and on the principle contained in the maxim *actus curiae neminem gravabit* it is really the duty of the Court to grant restitution under its inherent powers when a person has been deprived of his property due to an order of the Court which has subsequently been varied or reversed as being erroneous. It was held in A. I. R. 1975 All. 102 that even if the respondents could not invoke the powers of the Court to grant restitution under S. 144, C. P. C., they could certainly do so under S. 151, C. P. C. (*Gangadhar v. Raghubar Dayal*, A. I. R. 1975 All. 102).

Limitation.—There was some doubt as to whether an application for restitution under S. 144 was governed by Article 136 or Article 137 of the Indian Limitation Act, 1963, which depended upon whether proceedings under S. 144 were deemed to be execution proceedings of the decree of the appellate court or not. The application had, therefore, to be filed within twelve years from the time when the decree or order became enforceable, or within three years when the right to apply accrued. The controversy has, however, been set at rest by the decision of the Supreme Court in *Mahijibai v. Manibai* (A. I. R. 1965 S. C. 1477), with the result that an application for restitution under S. 144, C. P. C., is now treated as an application for execution of decree.

Section 144 defines the powers of the Court and expressly bars the maintainability of a suit in respect of a relief obtainable under this section. The section does not either expressly or by necessary implication change the nature of the proceedings. Its object is limited. It seeks to avoid the conflict and to make the scope of restitution clear and unambiguous. It does not say that an application for restitution, which till the new Procedure Code was enacted, was an application for execution, should be treated as an original petition. Whether an application is one for execution of a decree or is an original application depends upon the nature of the application and the relief asked for. When a party who lost his property in execution of a decree seeks to recover the same by reason of the appellate decree in his favour, he is not initiating any original proceeding, but he is only concerned with the working out of the appellate decree in his favour. The application flows from the appellate decree and is filed to implement or enforce the same. He is entitled to the relief of restitution, because the appellate decree enables him to obtain that relief, either expressly or by necessary implication. He is recovering the fruits of the appellate decree. *Prima facie*, therefore, having regard to the history of the section, there is no reason why such an application shall not be treated as one for the execution of the appellate decree.

Section 144 may have been placed in Part XI under the heading 'Miscellaneous' as relief of restitution may cover cases other than those arising

in execution of a decree of an appellate court setting aside the decree of a court under appeal. The placing of a particular section in a part of the Code dealing with a specific subject-matter may support the contention that that section deals with a part of the subject dealt with by that part, but that cannot be said when a particular section appears under a part dealing with miscellaneous matters. The part under the heading 'Miscellaneous' indicates that the sections in that part cannot be allocated wholly to a part dealing with a specific subject, for the reason that the sections entirely fall outside the other part or for the reason that they cannot entirely fall within a particular part.

The argument, that if an application under section 144 is an application for execution it will be inconsistent with S. 38, C.P.C. cannot be accepted. Under S. 144 an application can be filed only before the court of the first instance, whereas under S. 38 a decree may be executed either by the court which passed it or by the court to which it is sent for execution. But under S. 37, C. P. C., the expression "Court which passed a decree" includes the court of first instance where the decree to be executed has been passed in the exercise of appellate jurisdiction. A combined reading of Ss. 37 and 38 indicates that the court of first instance is the court which passed the decree within the meaning of S. 38 and therefore an application for execution of the decree can be filed therein. Where the court of first instance is deemed to be the court which passed the decree, there is no difficulty in holding that the said court can transfer the decree under S. 39 of the Code. (*Mahijibhai vt Manibhai*, A. I. R. 1965 S. C. p. 1477).

145. Enforcement of liability of surety.—Where any person has furnished security or given a guarantee—

(a) for the performance of any decree or any part thereof,
or

(b) for the restitution of any property taken in execution of a decree, or

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed in the manner herein provided for the execution of decrees, namely :—

- (i) if he has rendered himself personally liable, against him to that extent ;
- (ii) if he has furnished any property as security, by sale of such property to the extent of the security ;
- (iii) if the case falls both under clauses (i) and (ii) then to the extent specified in those clauses,

and such person shall be deemed to be a party within the meaning of section 47.

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

The provisions of the section have been amplified by the Amendment Act, 1976, so as to empower the court in execution of the decree or order to sell the property furnished as security by the surety, to the extent of the security.

146. Proceedings by or against representatives.—Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

147. Consent or agreement by persons under disability.—In all suits to which any person under disability is a party, any consent or agreement, as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement.

148. Enlargement of time.—Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

There are various provisions in the Code prescribing or allowing the doing of an act for which time is fixed or granted by the Court. In all such cases, the Court has power under S. 148 of the Code to enlarge the time, even after the expiration of the period originally fixed. The time granted by the Court for payment of costs, while setting aside an *ex parte* decree, as a condition precedent thereto, is not an act prescribed or allowed by the Code. The Court fixes or grants time for payment of the costs, but it is not doing an act prescribed or allowed by the Code. Section 148 does not apply to such a case; S. 151 can, however, be invoked in such a case. Nothing in S. 148 would conflict with the exercise of powers under S. 151 in such cases.

Even in cases where an order is made by the Court for doing a thing within a particular time and the order further provides that the application, suit or appeal shall stand dismissed if the thing is not done within the time fixed, the Court has jurisdiction, if sufficient cause is made out, to extend the

time even when the application for extension of time is made after the expiry of the time fixed. It is not the application for grant of further time, whether made before or after the expiry of the time granted which confers jurisdiction on the Court. The Court possesses the jurisdiction under S. 148, C. P. C. to enlarge the time and the application merely invokes that jurisdiction. (*Gobardhan Singh v. Barsati*, 1972 A. L. J. 169, F. B.)

148A. Right to lodge a caveat.—(1) Where an application is expected to be made, or has been made, in a suit or proceeding instituted, or about to be instituted, in a Court, any person claiming a right to appear before the Court on the hearing of such application may lodge a caveat in respect thereof.

(2) Where a caveat has been lodged under sub-section (1), the person by whom the caveat has been lodged (hereinafter referred to as the caveator) shall serve a notice of the caveat by registered post, acknowledgment due, on the person by whom the application has been, or is expected to be, made under sub-section (1).

(3) Where, after a caveat has been lodged under sub-section (1), any application is filed in any suit or proceeding, the Court shall serve a notice of the application on the caveator.

(4) Where a notice of any caveat has been served on the applicant, he shall forthwith furnish the caveator, at the caveator's expense, with a copy of the application made by him and also with copies of any paper or document which has been, or may be, filed by him in support of the application.

(5) Where a caveat has been lodged under sub-section (1), such caveat shall not remain in force after the expiry of ninety days from the date on which it was lodged unless the application referred to in sub-section (1) has been made before the expiry of the said period.

With a view to preventing any party to obtain an *ex parte* order S. 148-A empowers any person claiming a right to appear before the Court on the hearing of an application, which is expected to be made, or has been made, in a suit or proceeding instituted, or about to be instituted, in a court, to lodge a caveat in respect thereof. Where a caveat has been lodged, the person by whom the caveat has been lodged, viz, the caveator, shall serve a notice of the caveat by registered post, acknowledgment due, on the person by whom the application has been, or is expected to be, made. Where after a caveat has been lodged, any application is filed in any suit or proceeding, the court shall serve a notice of the application on the caveator. Where a notice of any caveat has been served on the application, he shall forthwith furnish the caveator, at the caveator's expense, with a copy of the application

made by him and also with copies of any paper or document which has been, or may be, filed by him in support of the application.

The caveat shall not remain in force indefinitely and a time limit of of ninety days has been fixed from the date on which it was lodged.

149. Power to make up deficiency of court fees.—

Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee ; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

Under the provisions of S. 149, C. P. C. as a practice, the courts grant time for payment of court fee on coming to an adverse conclusion on a pauper application. If the court in which the pauper application is filed can grant time for payment of court fee on refusing to permit the applicant to sue as an indigent person, the appellate court also can grant time for payment of the court fee while dismissing the appeal because the appeal is only a continuation of the original proceeding. The provisions of S. 149, C. P. C. are sufficiently wide and should be applied for granting time for filing the requisite court fee even at the stage of revision against the rejection of the application for leave to sue as an indigent person. (*Tej Dat Singh v. Dat Singh*, A. I. R. 1948 Oudh, 157 ; *Beeran Alli Desireddi v. Yeluri Rama Rao*, A. I. R. 1962 A. P. 55).

It is true that the petitioner filed the application for granting time under sections 151 and 153, C. P. C. while the application should have been filed under S. 149, C. P. C. which is the proper provision for granting time for payment of the court fee. It does not, however, matter. On the ground that a wrong provision of law has been quoted in the application it cannot be dismissed. The application can still be treated as the one filed under the provision which is the correct provision of law. (*Beerav Alli Desireddi v. Yeluri Rama Rao*, A. I. R. 1972 Andhra Pradesh, 55).

150. Transfer of business.—Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.

INHERENT JURISDICTION OF A CIVIL COURT

Since laws are general rules, they cannot regulate for all time to come so as to make express provision against all inconveniences, which are infinite in

number, and to foresee all cases that may possibly happen with a view to providing a remedy. A code however wisely framed cannot make express provisions against all contingencies and for all times. The purpose of the law is to secure the ends of justice. The laws are not ends in themselves but are only a means for securing justice. If the ordinary rules of procedure result in injustice in any case and there is no other remedy, it is the duty of the court to override those rules for achieving the ends of justice.

It is to serve the necessity that provision has been made in S. 151 of the Code of Civil Procedure, which reads thus :

151. Saving of inherent powers of Court.—Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

Saving Clause.—It is a saving clause and only gives legislative recognition of an age old and well established principle that every court has inherent power to do that real and substantial justice between the parties for the administration of which alone it exists. It does not confer any substantive right on parties but is meant to get over the difficulties arising from rules of procedure. (*Jagannath Singh v. Drigpal Singh*, 1940 O. W. N. 1072). Section 151 gives no right to a party to make an application. It gives power to the court to pass such orders as it thinks fit. [*Tej Raj v. Sansmal*, I. L. R. (1963) 3 Raj. 146]. Section 151 is really intended to prevent courts from being rendered impotent by any omission in the Code ; but it is not intended to override the main enactment of the law.

The inherent powers are inherent in the Court itself and have not been conferred by the Code ; these powers are independent of and in addition to any other powers that the Court may exercise under the Code. [*Smt. Bhagwanti v. Kedarnath Kapur*, (1974) 77 P. L. R. (D) 5].

Illustration.—The court has an inherent power under S. 151, C. P. C. :

(a) to consolidate suits and appeals including appeals to the Supreme Court ;

(b) to postpone the hearing of suits pending the decision of a selected action or where some of the issues are common in another pending suit ;

(c) to stay cross suits on the ground of convenience ;

(d) to allow a defence in *forma pauperis* ;

(e) to grant restitution apart from the provisions of S. 144, C. P. C.

Where the court rectifies a mistake in a decree in the exercise of its inherent powers, it has jurisdiction to order restitution of any benefit which may have been received wrongly by the persons who were not entitled to such benefits but for the mistake in the decree. (*Samal Singh v. Jhunkoo Singh*, 231 I. C. 250) ;

(f) to add a party or to transpose parties, or where the appeal is filed against dead persons to allow the appellant to add legal representatives of the deceased as parties in a proper case ;

(g) to entertain the application of a third person to be made a party ;

(h) to punish summarily by imprisonment for contempts of court committed by the publication of a libel out of court ;

(i) to stay the drawing up of the court's own orders or to suspend their operation, if the necessities of justice so require ;

(j) to stay the carrying out of a preliminary order pending appeal ;

(k) to amend decrees by correcting errors in cases not covered by S. 152. The court has an inherent jurisdiction to rectify its own mistake and to do justice between the parties where injustice has been done to them due to the mistake of the court. (*Sheo Aushdhalaya v. Pandit Tirthnarain Jha*, 1955 B. L. J. R. 1.) ;

(l) to restrain by injunction a person from proceeding with a suit in another court ;

(m) to vacate an order obtained by fraud practised upon it or by abusing the process of the court. (*Chaoki Amma v. Mammen*, 1955 K. L. T. 459) ;

(n) to set aside an order made *ex parte* and without notice to the parties to be affected thereby if a proper case is substantiated ;

(o) to remand a suit in a case to which neither O. 41, r. 23, nor O. 41, r. 25 applies—the Court, by reason of its inherent jurisdiction, may order remand in cases other than the case specified in O. 41, r. 23, if it is necessary for the ends of justice ;

(p) to interfere where its decree is being executed in a manner manifestly at variance with the purposes and interest of the decree ;

(q) to set aside a compromise decree when the court has been misled into recording it by a statement of the pleader that he was specially authorised to compromise when in fact he was not so authorised ;

(r) to stay a suit even when it does not come within S. 10, C. P. C. ;

(s) to apply the principles of *res judicata* to cases not falling within S. 11 of the Code ;

(t) to recall and cancel the court's invalid orders, etc.

The court has jurisdiction under S. 151, C. P. C. to restore a suit previously dismissed by it if it thinks that such restoration is necessary in the ends of justice.

A court can entertain an application for restoration of an application dismissed for default under inherent powers. There is, therefore, no reason to suppose that it cannot restore that also under S. 151 if it is dismissed for default. The power which gives the court a discretion to entertain an application must necessarily give the residuary powers to pass other orders *ex debito justitiae*. Thus it is not possible to construe an order dismissing an application which has itself been dismissed for default as an order dismissing the suit itself so as to be appealable under O. 43, r. 1 (c), C. P. C.

Every Court has an inherent power, quite independently of O. 6, r. 16, C. P. C. to strike out scandalous matter in any record of proceeding. Under S. 151, the court has power to expunge scandalous allegations which are

irrelevant to the proceedings, even though they are contained in an affidavit. But the allegations cannot be scandalous when they are relevant. [*Amalgamated Commercial Traders (Private) Ltd v. Hariprasad*, A. I. R. 1966 Mad. 116].

The court has inherent powers, in order to advance the cause of justice and not to allow justice to be defeated, to issue orders in the nature of even injunctions. Therefore, it cannot be said that the court has no power to issue stay of a suit under its inherent powers unless the case clearly falls within the four corners of O. 39, rr. 1 and 2. (*Abdul Ahad Baba v. Gulam Mohd. Dar*, A. I. R. 1967 J. & K. 75).

The court has jurisdiction under S. 151, C. P. C. to enquire into an allegation that the defendant who was shown as minor at the time of the institution of the suit and against whom a preliminary decree has been passed, was really not a minor but a major at that time, and, therefore, the preliminary decree passed against him is not binding on him. In the case of a preliminary decree the court does not become *functus officio*, but the suit still continues in that court and if before a final decree is passed, it is brought to the notice of that court that the preliminary decree was obtained by the plaintiff against a person who is not on the record, it is certainly open to that court to go into that question and amend its decree. (*Jawanmal v. Kantilal*, A. I. R. 1954 Raj. 246).

Statutory recognition of the inherent power of the Court.—The Code of Civil Procedure is not exhaustive and S. 151 does not confer any new powers but only makes a statutory recognition of the inherent power of the court to do certain things *ex debito justitiae* (to act as justice demands). It is in the ends of justice to avoid needless expense and inconvenience to parties. So the court will not refuse relief merely because the application therefor is made under a wrong section or because there is some technical defect.

The abuse of the process of the court may be the result of an act of the court itself (default of its officers) or may be done by the party (misrepresentation). In all such cases the court is empowered to remedy the wrong.

The exercise of such inherent power can only be invoked where the court is satisfied that the provisions of the Code are not sufficient to meet the exigencies of the case : Justice Asutosh Mookerjee in the case of *Ghuznavi v. Allahabad Bank Ltd.*, (I. L. R. 74 Calcutta, 929, F. B.).

Justice Woodroff in *Hukum Chand v. Kamalanand Singh*, (33 Calcutta, 927) observed with reference to the applicability of S. 151 of the Code :

“I am not aware of any authority which has laid down that the Code of Civil Procedure is exhaustive. The essence of a Code no doubt is to be exhaustive on the matters in respect of which it declares the law, on any point specifically dealt with by it. In respect of such matters the court cannot disregard or go outside the letters of the enactment according to its true construction. The Code does not affect the power and duty of a court where no specific rule exists to act according to justice, equity and good conscience, though in exercise of such power it must be careful to see that its decision is based on sound general principles and is not in conflict with them or the intentions of the legislature.

* * * *

“The court has, therefore, in many cases where the circumstances require, it acted upon the assumption of the possession of an inherent power to act

ex debito justitiae and to do that real and substantial justice for the administration of which alone it exists."

It has, therefore, to be noted that the Code is not exhaustive and in matters with which it does not deal the court will exercise an inherent jurisdiction to do justice between the parties as is warranted under the circumstances and which the necessities of the case require.

The words "ends of justice" in S. 151, wide as they are, do not mean vague and indeterminate notions of justice, but justice according to the statutes and laws of the land. They cannot mean that express provisions of the statute can be overridden at the dictates of what one might by private emotion or arbitrary preference call or conceive to be justice between the parties. (*Lalla Prasad v. Ram Kwar*, 34-A. 426).

Section 151, C. P. C., gives statutory recognition to the inherent power of the Court to make such orders as may be necessary for the ends of justice, and in the absence of any specific law to the contrary the Court is entitled to exercise this power. Indeed, to recall and cancel an invalid order, or an order passed inadvertently or by oversight, is not simply permitted but is the duty of the Court, which should always be vigilant not to allow any act of itself or any mistake of counsel to do wrong to the suitor. How exactly the error has occurred is irrelevant, nor for the revocation of an erroneous order any cause other than the irregularity of the order itself need be considered. A mere mistake of law is normally not a sufficient ground for correcting a wrong order, but if the mistake is an obvious one due to failure to notice a particular piece of legislation the Court has the power to make the necessary correction and should not be hesitant in exercising that power. As to the aggrieved party, it has a right to choose between approaching the court itself under S. 151 and going to the Court of Appeal (assuming of course that an appeal is maintainable).

The High Court does possess the power to recall and correct an invalid or manifestly erroneous order passed by it in the exercise of its jurisdiction under Art. 226 of the Constitution in respect of the enforcement or vindication of civil rights. So far as the Allahabad High Court is concerned this power is derived not from S. 114 and O. XLVII but from S. 151 of the Code of Civil Procedure.

There is nothing in Art. 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. (*Shivdeo Singh v. State of Punjab*, A. I. R. 1963 S. C. 1909).

Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Court, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibitions cannot be presumed. Where a wrong order cannot be corrected under S. 114 and O. 47, r. 1, C. P. C., it by no means follows that the correction cannot be made under S. 151. The Court has power to act under S. 151, C. P. C., for doing justice. (*Dan Singh Bist v. Additional Collector Bijnor*, 1949 A. L. J. R. 798).

It has been held by their Lordships of the Supreme Court in *Padam Sen v. The State of Uttar Pradesh* (1961) 1 S. C. R. 884 that the inherent powers of the court are in addition to the powers specifically conferred on the court by the Code. They are complementary to those powers and therefore it must be held that the court is free to exercise them for the purposes mentioned in S. 151 of the Code when the exercise of those powers is not in any way in conflict with what had been expressly provided in the Code or against the intentions of the Legislature. It is also well recognised that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code.

Discretionary Powers.—The inherent powers exercised under S. 151, C. P. C. are discretionary. In considering the question of propriety in invoking the power, the court should take into account several matters, some of which are the complexity of the question involved, availability of a more complete and efficacious remedy by means of a suit and the apparent justice of the claim. These are not exhaustive but merely illustrative. They would vary according to the facts and circumstances of each case. No hard and fast rule can be laid down.

Where the averments in the application did not make out a case as to how the exercise of the inherent power of the court was necessary for the ends of justice or to prevent abuse of the process of the court and the applicant did not come to the court with the clean hands and had suppressed the facts and the case involved complexity of facts and the justice of the claim was adverse to the applicant, it was held that there was no case for the exercise of inherent powers in favour of the applicant. (*Soudamini Misra v. Fagumani Khuntia*, 32 Cut. L. T. 133).

Executing Court can use inherent powers.—It is settled law that power of a court to direct restitution is inherent in the court itself. It is the fundamental principle that a court of justice is under a duty to repair the injury done to a party by its act. The executing court can therefore grant restitution under its inherent powers. (*Ganesh Prasad Bharat v. Anugrahananda Sahu*, I. L. R. (1965) Cut. 469).

Limitations.—The limitations of the inherent power may be noted. In the first place, the court has no inherent power to do what is prohibited by the Code so as to defeat a statutory provision of the law of the land. Section 151, C. P. C. does not invest the court with jurisdiction over matters which are excluded from its cognizance. Thus no appeal can be allowed from a non-appealable order. Similarly when once a judgment is signed it cannot be altered or added to save as provided by S. 15 or on review. In the same way an *ex parte* decree cannot be set aside when no case has been made out within the meaning of Order 9, r. 13 of the Code.

In the second place, the inherent power is not to be exercised where the applicant has his remedy provided elsewhere in the Code but has neglected to avail himself of it.

In the third place, the inherent power must not be exercised so as to come in conflict with the general principles of law. The court cannot entertain a suit arising in a place where it has no jurisdiction, nor can it acting under S. 151 recall its own previous order or hear appeal from its own judgment except as provided by the Code. The inherent powers of the court cannot also be exercised in order to cure a legal defect.

In the fourth place, the inherent powers of the court should not be invoked to circumvent the mandatory provisions of the Code of Civil Procedure. Independently of the provisions of O. 9, r. 13 of the Code of Civil Procedure under which provision an application for setting aside an *ex parte* decree has to be made, the court is not entitled to set aside an *ex parte* decree under its inherent powers. (*Uttar Pradesh State v. Shib Saran Agarwal*, 1959 A. L. J. R. 818).

In the fifth place, the inherent power vested in the court is discretionary. The mere fact that there is remedy will not attract the provisions of S. 151, C. P. C. unless it is necessary for the ends of justice or to prevent abuse of the process of the court.

In the sixth place, the exercising jurisdiction under its inherent powers, the court is influenced by the justice of the case in favour of the party who invokes its aid. Where the party has been guilty of laches or has been negligent in prosecuting his remedy, a court of law would be most reluctant to exercise its inherent powers in his favour. Equity aids the vigilant and not the indolent. (*Janki Sahu Trust v. Ram Palat*, 1950 A. L. J. 833).

Lastly, if there be specific provision in the Code which would meet the necessities of the case, inherent powers cannot be invoked.

The inherent power of a court is in addition to and complementary to the powers expressly conferred under the Code. But that power will not be exercised if its existence is inconsistent with, or comes into conflict with, any of the powers expressly or by necessary implication conferred by the other provisions of the Code. (*Ram Chand and Sons Sugar Mills Private Ltd., Barabanki v. Kanhayalal*, 1967 A. L. J. 102).

Under the inherent power of courts recognised by S. 151, C. P. C., a court has no power to do that which is prohibited by the Code. Inherent jurisdiction of the court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. In other words, the Court cannot make use of the special provisions of S. 151 of the Code where a party had his remedy provided elsewhere in the Code and he neglects to avail himself of the same. Further, the power under S. 151 of the Code cannot be exercised as an appellate power. (*Nain Singh v. Koonwarjee*, (1971) 1. S. C. J. 252).

Appeal.—No appeal lies from an order passed by a court in the exercise of its inherent jurisdiction under S. 151, C. P. C., and the remedy of the aggrieved party is to move the High Court direct to exercise its revisional jurisdiction under the provisions of S. 151, C. P. C. (*Manorama Devi v. Sabita Dasi*, 54 C. W. N. 848, and *Bishwanath Singh v. Shaikh Abdul Jabbar*, 1947 A. L. J. 518 F. B.). Consequently there is no appeal against an order of remand passed under S. 151, C. P. C. It has, however, been held that where the discretion permitted under S. 151 is used to enlarge a provision of procedural law under any other section or order of the Code, the matter is appealable.

152. Amendment of judgments, decrees or orders.—Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission

may at any time be corrected by the Court either of its own motion or on the application of any of the parties.

The court can correct an accidental mistake both in the judgment and the decree, but a mere ambiguity is not a ground for correction.

The alterations, amendments, or corrections, which S. 152 authorises, are limited by its provisions. They are clerical or arithmetical mistakes in judgments, decrees or orders, and in addition errors arising in judgments, decrees or orders from any accidental slip or omission. (*Ramakrishnan Chettiar v. Radhakrishnan Chettiar*, I. L. R. 1948 Mad. 268). Such clerical mistakes or slip orders falling under S. 152, C. P. C. can be corrected even *suo motu* by the court or on the application of any of the parties.

The test for amendment is whether the order as it stands represents the intention of the judge at the time he made it and if it does, then the mistake in it cannot be treated as an accidental slip or omission which may be corrected under S. 152, C. P. C. A mistake arising from an oversight on the part of the court can be corrected under S. 152. Where by inadvertence or oversight an entry as to pleader's fee was made without giving any consideration to the question of calculation, it can be amended. (*Nathu Lal v. Mishri Lal*, M B-L-J. 1953 H. C. R. 812).

Section 152, C. P. C. should not be given a narrow construction. It gives power to rectify any accidental slip or omission in a judgment, decree or order and might include an accidental slip or omission traceable to the conduct of the parties themselves. In making the correction the court cannot go into any disputed questions, nor could it correct errors anterior to the proceedings before it. For such a purpose, the proper proceeding is by way of a suit under S. 31, Specific Relief Act, 1877. (S. 26 of the 1963 Act). (*Bela Debi v. Bon Behari Roy*, A.I.R. 1952 Cal. 86).

Correction of clerical error in the decretal order.—Where the decretal order drawn in the High Court as a result of inadvertence and through error introduced the words “mesne profits” instead of the words “net profits” the error can be corrected by the High Court under Ss. 151 and 152 of the Code of Civil Procedure even though the appeals from the decree may have been admitted in the Supreme Court before the date of correction. (*Jannekirama Iyer v. Nilakanta Iyer*, A.I.R. 1962 Supreme Court, 633).

Appeal or Revision.—An order to amend a decree is different from the amended decree. A revision lies from the former order, but there lies an appeal from an amended decree. No appeal lies from an order granting or refusing amendment ; only a revision lies.

153. General Power to amend.—The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit ; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

A *bona fide* error committed in the petition of appeal in writing the name of a deceased person as the respondent can be allowed to be rectified by allow-

ing an amendment under S. 153, C.P.C. and directing his legal representatives to be impleaded in his place. (*Travancore Devaswom Board v. Kandaruvasu Devaru*, I. L. R. 1955 T. C. 1222).

Rules of procedure are intended to be handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. [*Jai Jai Ram Manohar Lal v. National Building Material Supply, Gurgaon*, (1970) 1. S. C. J. 120].

Power to amend decree or order where appeal is summarily dismissed.—Where an Appellate Court dismisses an appeal under rule 11 of Order XLI, the power of the Court to amend, under section 152, the decree or order appealed against may be exercised by the Court which had passed the decree or order in the first instance, notwithstanding that the dismissal of the appeal has the effect of confirming the decree or order, as the case may be, passed by the Court of first instance.

A new section, S. 153A has been added by the Amendment Act, 1976, so as to make it clear that, even in a case where the appellate court has summarily dismissed the appeal under r. 11 of O. XLI of the Code, the power of the court to amend judgments, decrees or orders under S. 152 shall be exercised by the court which had passed the decree or order in the first instance, notwithstanding that the dismissal of the appeal has the effect of confirming the decree or order passed by the court of first instance. (S. 153-A).

Place of trial to be deemed to be open Court.—The place in which any Civil Court is held for the purpose of trying any suit shall be deemed to be an open Court, to which the public generally may have access so far as the same can conveniently contain them :

Provided that the presiding Judge may, if he thinks fit, order at any stage of any inquiry into or trial of any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court. (S. 153B).

An express provision on the analogy of S. 327 of the Code of Criminal Procedure, 1973, has been made in the Code of Civil Procedure, providing that the place in which any civil court is held for the purpose of trying any suit shall be deemed to be an open court to which the public generally may have access so far as the same can conveniently contain them. The presiding judge may, however, if he thinks fit, order at any stage of any inquiry into or trial of any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the court.

154. Saving of present right of appeal.—Repealed by the Repealing and Amending Act, 1952 (48 of 1952).

155. Amendment of certain Acts.—Repealed by the Repealing and Amending Act, 1952 (48 of 1952).

156. Repeals.—Repealed by S. 3 and Schedule II of the Second Repealing and Amending Act, 1914 (17 of 1914).

157. Continuance of orders under repealed enactment.—Notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed, forms framed, appointments made and powers conferred under Act VIII of 1859 or under any Code of Civil Procedure or any Act amending the same or under any other enactment hereby repealed shall, so far as they are consistent with this Code, have the same force and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under this Code and by the authority empowered thereby in such behalf.

158. Reference to Code of Civil Procedure and other repealed enactments.—In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far may be practicable, be taken to be made to this Code or to its corresponding Part, Order, section or rule.

APPENDIX A

PLEADINGS

(1) TITLES OF SUITS

IN THE COURT OF—

A. B. (add description and residence)

... **Plaintiff**

C. D. (add description and residence) ^{against}

... **Defendant**

(2) **DESCRIPTION OF PARTIES IN PARTICULAR CASES**
[The Union of India or the State of

[The Union of India or the State of.....as the case may be].

The Advocate General of

The Collector of

The State of

The A. B. Company, Limited, having its registered office at

A. B., a public officer of the C. D. Company.

A. B. (add description and residence), on behalf of himself and all other creditors of C. D. late of (add description and residence).

A. B. (*add description and residence*), on behalf of himself and all other holders of debentures issued by the Company, Limited.

The Official Receiver.

A. B., a minor (*add description and residence*), by C. D. or by the Court of Wards, his next friend.

A. B. (add description and residence), a person of unsound mind [or of weak mind] by C. D., his next friend.

A. B., a firm carrying on business in partnership at

A. B. (add description and residence), by his constituted attorney **C. D. (add description and residence).**

A. B. (add description and residence), Shebait of Thakur.

A. B. (add description and residence), executor of C. D. deceased.

A. B. (*add description and residence*), heir of C. D., deceased.

— — —
(3) PLAINTS

No. 1

MONEY LENT

(Title)

A. B., the above-named plaintiff, states as follows :—

1. On the.....day of.....19 , he lent the defendantrupees payable on the.....day of.....
2. The defendant has not paid the same, except
rupeespaid on the day of 19 .
[If the plaintiff claims exemption from any law of limitation, say :—]
3. The plaintiff was a minor [or insane] from the.....day of
..... till the.....day of
4. [Facts showing when the cause of action arose and that the Court has jurisdiction].
5. The value of the subject-matter of the suit for the purpose of jurisdiction isrupees and for the purpose of court-fees is.....rupees.
6. The plaintiff claims.....rupees, with interest at.....per cent. from.....the..... day of19 .

— — —
No 2

MONEY OVERPAID

(Title)

A. B., the above-mentioned plaintiff, states as follows :—

1. On the..... day of..... 19 ,..... the plaintiff agreed to buy and the defendant agreed to sell..... bars of silver atannas par tola of fine silver.
2. The plaintiff procured the said bars to be assayed by E. F., who was paid by the defendant for such assay, and E. F. declared each of the bars to contain 1,500 totals of fine silver, and the plaintiff accordingly paid the defendantrupees.
3. Each of the said bars contained only 1,200 totals of fine silver, of which the plaintiff was ignorant when he made the payment.
4. The defendant has not repaid the sum so overpaid.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed]

— — —
No. 3

GOODS SOLD AT A FIXED PRICE AND DELIVERED

(Title)

A. B., the above-named plaintiff, states as follows :—

1. On the.....day of... ..19, E. F. sold and delivered to the defendant [one hundred barrels of flour or the goods mentioned in the schedule hereto annexed, or sundry goods].

2. The defendant promised to pay _____ rupees for the said goods on delivery (or on the _____ day of _____, some day before the *plaint was filed*).

3. He has not paid the same.

E. F. died on the _____ day of _____ 19 ____.
By his last will he appointed his brother, the plaintiff, his executor.
(*As in paras. 4 and 5 of Form No. 1*).

7. The plaintiff as executor of E. F., claims. [*Relief claimed*]

No. 4

GOODS SOLD AT A REASONABLE PRICE AND
DELIVERED

(*Title*)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19 ____, the plaintiff sold and delivered to the defendant [*sundry articles of house furniture*], but no express agreement was made to the price.

2. The goods were reasonably worth _____ rupees.

3. The defendant has not paid the money.

[*As in paras. 4 and 5 of form No. 1, and Relief claimed.*]

No. 5

GOODS MADE AT DEFENDANT'S REQUEST, AND NOT
ACCEPTED

(*Title*)

A. B., the above-named plaintiff, states as follows :

1. On the _____ day of _____ 19 ____, E. F., agreed with the plaintiff that the plaintiff should make for him (*six tables and fifty chairs*) and that E. F. should pay for the goods on delivery _____ rupees.

2. The plaintiff made the goods, and on the _____ day of... 19 ____, offered to deliver them to E. F. and has ever since been ready and willing so to do.

3. E. F. has not accepted the goods or paid for them.

(*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*)

No. 6.

DEFICIENCY UPON A RESALE (GOODS SOLD AT
AUCTION)

(*Title*)

A. B., above-named plaintiff, states as follows :

1. On the _____ day of _____ 19 ____, the plaintiff put up at auction *sundry (goods)*, subject to the condition that all goods not paid for and removed by the purchaser within (*ten days*) after the sale should be resold by auction on his account, of which condition the defendant had notice.

2. The defendant purchased (*one crate of crockery*) at the auction at the price of _____ rupees.

3. The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for (*ten days*) after.

4. The defendant did not take away the goods purchased by him, nor pay for them within (*ten days*) after the sale, nor afterwards.

5. On the day of 19 , the plaintiff re-sold the (*crate of crockery*), on account of the defendant, by public auction, for rupees.

6. The expenses attendant upon such re-sale amounted to rupees.

7. The defendant has not paid the deficiency thus arising amounting to...rupees.

(*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*)

No. 7

SERVICES AT A REASONABLE RATE

(*Title*)

A. B., the above-named plaintiff, states as follows :

1. Between the day of 19 , and the day of 19 , at plaintiff (*executed sundry drawings, designs and diagrams*) for the defendant, at his request, but no express agreement was made as to the sum to be paid for such services.

2. The services were reasonably worth rupees.

3. The defendant has not paid the money.

(*As in paras. 4 and 5 of Form No. 1 and Relief claimed.*)

No. 8

SERVICES AND MATERIALS AT A REASONABLE COST

(*Title*)

A. B., the above-named plaintiff, states as follows :

1. On the day of 19 , at , the plaintiff built a house (known as No. , in), and furnished the materials therefor, for the defendant, at his request but no express agreement was made as to the amount to be paid for such work and materials.

2. The work done and materials supplied were reasonably worth rupees.

3. The defendant has not paid the money.

(*As in paras. 4 and 5 of Form No. 1 and Relief claimed.*)

No. 9

USE AND OCCUPATION

(*Title*)

A. B., the above-named plaintiff, executor of the will of X, Y., deceased, states as follows :—

1. That the defendant occupied the (house No. Street,) by permission of the said X, Y., from the day of 19 , until the day of 19 , and no agreement was made as to payment for the use of the said premises,

2. That the use of the said premises for the said period was reasonably worth _____ rupees.

3. The defendant has not paid the money.

(As in Paras. 4 and 5 of Form No. 1.)

4. The plaintiff as executor of X, Y, claims (*Relief claimed.*)

No. 10

ON AN AWARD

(Title)

A. B., the above-named plaintiff, states as follows :

1. On the _____ day of _____ 19 __, the plaintiff and defendant having a difference between them concerning (a demand of the plaintiff for the price of ten barrels of oil which the defendant refused to pay) agreed in writing to submit the difference to the arbitration of E. F. and G. H, and original document is annexed hereto.

2. On the _____ day of _____ 19 __, the arbitrators awarded that the defendant should (pay the plaintiff _____ rupees).

3. The defendant has not paid the money.

(As in paras. 4 and 5 of Form No. 1 and *Relief claimed.*)

No. 11

ON A FOREIGN JUDGMENT

(Title)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19 __, at _____, in the State, (or Kingdom) of _____, the _____ Court of that State (or Kingdom), in a suit therein pending between the plaintiff and the defendant, duly adjudged that the defendant should pay to the plaintiff _____ rupees, with interest from the said date.

2. The defendant has not paid the money.

(As in paras. 4 and 5 of Form No. 1, and *Relief claimed.*)

No. 12

AGAINST SURETY FOR PAYMENT OF RENT

(Title)

A. B., the above-named plaintiff states as follows :—

1. On the _____ day of _____ 19 __, E. F. hired from the plaintiff for the term of _____ years, the (house No. _____ Street), at the annual rent of _____ rupees, payable (monthly).

2. The defendant agreed, in consideration of the letting of the premises to E. F., to guarantee the punctual payment of the rent.

3. The rent for the month of _____ 19 __, amounting torupees, has not been paid.

(If, by the terms of the agreement, notice is required to be given to...the

surety, add :—)

4. On the _____ day of _____ 19____, the plaintiff gave notice to the defendant of the non-payment of the rent, and demanded payment thereof.

5. The defendant has not paid the same.

(As in paras. 4 and 5 of Form No. 1, and Relief claimed).

— — —
No. 13

BREACH OF AGREEMENT TO PURCHASE LAND

(Title)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19____, the plaintiff and defendant entered into an agreement, and the original document is hereto annexed.

(Or, on the _____ day of _____ 19____, the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty bighas of land in the village of _____ for _____ rupees).

2. On the _____ day of _____ 19____, the plaintiff, being then the absolute owner of the property (and the same being free from all incumbrances as was made to appear to the defendant), tendered to the defendant a sufficient instrument of transfer of the same *(or, was ready and willing, and is still ready and willing, and offered, to transfer the same to the defendant by a sufficient instrument)* on the payment by the defendant of the sum agreed upon.

3. The defendant has not paid the money.

(As in paras. 4 and 5 of Form No. 1, and Relief claimed)

— — —
No. 14

NOT DELIVERING GOODS SOLD

(Title)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19____, the plaintiff and defendant mutually agreed that the defendant should deliver (one hundred berrels of flour) to the plaintiff on the _____ day of _____ 19____, and that the plaintiff should pay therefor _____ rupees on delivery.

2. On the (said) day the plaintiff was ready and willing, and offered, to pay the defendant the said sum upon delivery of the goods.

3. The defendant has not delivered the goods, and the plaintiff has been deprived of the profits which would have accrued to him from such delivery.

(As in paras. 4 and 5 of Form No. 1, and Relief claimed).

No. 15

WRONGFUL DISMISSAL

(Title)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19____, the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as (an accountant, or in the capacity of foreman, or as the case may be), and that the defendant should employ the plaintiff as such for the term of (one year) and pay him for his services _____ rupees (monthly).

2. On the _____ day of _____ 19____, the plaintiff entered upon the service of the defendant and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year whereof the defendant always has had notice.

3. On the _____ day of _____ 19____, the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, or to pay him for his services.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 16

FOR WRONGFUL DISMISSAL

In the Court of the Civil Judge, Allahabad

Suit No. _____ of 1951

X, son of Y, caste Khattri, resident of Khushal Parbat,
AllahabadPlaintiff

W, son of Z, caste Agrawala, resident of Civil Lines,
Allahabad... ..Defendant.

The plaintiff begs to state as follows :

1. That on the 1st January, 1949, the plaintiff and the defendant mutually agreed that the former should serve as the General Manager of the latter's factory for a period of five years on a salary of Rs. 500 per month.

2. That in pursuance of the said agreement the plaintiff entered in the service of the defendant on the same date, viz., the 1st January, 1949.

3. That the defendant wrongfully discharged the plaintiff on the 1st January, 1951, and refused to permit him to serve for the full term of five years as agreed upon or to pay him for his services.

4. That the plaintiff has ever since been and still is ready and willing to continue in such service for the remainder of the said period of five years in accordance with the agreement.

5. That the plaintiff has suffered Rs. 18,000/-, on account of damages due to his wrongful dismissal before the stipulated time as per details given below :

Particulars of damages :

Pay of 36 months, the unexpired portion of
service.....Rs. 18,000.

6. That the cause of action arose within the jurisdiction of this court at Allahabad on the 1st of January, 1951, when the defendant wrongfully discharged the plaintiff from his services.

7. That the valuation of the suit for the purpose of court fees and jurisdiction is Rs. 18,000/- and the court is competent to try the same.

Relief

The plaintiff, therefore, prays that the defendant be directed to pay Rs. 18,000/- on account of damages for wrongful dismissal.

Sd. X
(Plaintiff)

Verification.—I, X, do verify that the facts stated in paragraphs 1 to 5 of the above plaint are true to my personal knowledge and the contents of paragraphs 6 and 7 are believed by me on information received to be correct. I append my signature to this verification at Allahabad on the 10th January, 1951.

Sd. X
(Plaintiff)

R. Tandon.
Advocate.

(Note.—The suit could not be filed in the Munsif's Court as that court has jurisdiction in the Uttar Pradesh to try suits in which the value of the subject-matter does not exceed Rs. 5,000/-. Both the Civil Judge and District Judge have unlimited pecuniary jurisdiction, but in accordance with S. 15 of the Code every suit has to be instituted in the court of the lowest grade competent to try it and hence the suit was filed in the Civil Judge's Court).

No. 17

BREACH OF CONTRACT TO SERVE

(Title)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19____, the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at an [annual] salary of _____ rupees, and that the defendant should serve the plaintiff as [an artist] for the term of [one year].

2. The plaintiff has always been ready and willing to perform his part of the agreement [and on the _____ day of _____ 19____, offered so to do.]

3. The defendant [entered upon] the service of the plaintiff on the above-mentioned day, but afterwards, on the _____ day of _____ 19____, he refused to serve the plaintiff as aforesaid.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 18

AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP

(Title)

A. B., the above-mentioned plaintiff, states as follows :

1. On the _____ day of _____ 19____, the plaintiff and defendant entered into an agreement, and the original document is hereto annexed. (*Or state the tenor of the contract*).

[2. The plaintiff duly performed all the conditions of the agreement on his part.

3. The defendant (built the house referred to in the agreement in a bad and unworkmanlike manner).

As in paras. 4 and 5 of Form No. 1, and Relief claimed].

No. 19

ON A BOND FOR THE FIDELITY OF A CLERK

(Title)

A. B., the above-named plaintiff, states as follows :

1. On the _____ day of _____ 19____, the plaintiff took E. F. into his employment as a clerk.

2. In consideration thereof, on the _____ day of _____ 19____, the defendant agreed with the plaintiff that if E. F. should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all monies, evidences of debt or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding _____ rupees.

(*Or 2. In consideration thereof, the defendant by his bond of the same date bound himself to pay the plaintiff the penal sum of _____ rupees, subject to the condition that if E. F. should faithfully perform his duties as clerk and cashier to the plaintiff and should justly account to the plaintiff for all monies, evidences of debt or other property which should be at any time held by him in trust for the plaintiff, the bond should be void*).

(*Or 2. In consideration thereof, on the same date the defendant executed a bond in favour of the plaintiff, and the original document is hereto annexed*).

3. Between the _____ day of _____ 19____, and the _____ day of _____ 19____, E. F. received money and the other property, amounting to the value of _____ rupees, for the use of the plaintiff, for which sum he has not accounted to him, and the same still remains due and unpaid.

(As in paras. 4 and 5 of Form No. 1, and Relief claimed).

No. 20

BY TENANT AGAINST LANDLORD, WITH SPECIAL DAMAGE

(Title)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19____, the defendant, by a registered instrument, let to the plaintiff (the house No. _____, Street) for the term of _____ years, contracting with the plaintiff, that he, the plaintiff, and his legal representative should quietly enjoy possession thereof for the said term.

3. On the _____ day of _____ 19____, during the said term, E. F., who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom and still withholds the possession thereof from him.

4. The plaintiff was thereby (prevented from continuing the business of a tailor at the said place, was compelled to expend rupees in moving, and lost the customers of G. H. and I. J, by such removal).

(As in paras. 4 and 5 of Form No. 1, and Relief claimed).

**POLLUTING THE WATER UNDER THE PLAINTIFF'S
LAND**
(Title)

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain land called _____ and situate in _____ and of a well therein, and of water in the well, and was entitled to the use and benefit of the well and of water therein, and to have certain springs and streams of water which flowed and ran into the well to supply the same to flow or run without being fouled or polluted.

2. On the _____ day of _____ 19____, the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water which flowed into the well.

3. In consequence the water in the well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the well and water.

(As in paras. 4 and 5 of Form No. 1, and Relief claimed.)

CARRYING ON A NOXIOUS MANUFACTURE
(Title)

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain lands called _____, situate in _____

2. Ever since the _____ day of _____, 19____, the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands, and polluted the air, and settled on the surface of the lands.

3. Thereby the trees, hedges, herbage and crops of the plaintiff growing on the lands were damaged and deteriorated in value, and the cattle and live stock of the plaintiff on the lands became unhealthy, and many of them were poisoned and died.

4. The plaintiff was unable to graze the lands with cattle and sheep as he otherwise might have done, and was obliged to remove his cattle, sheep

and farming stock therefrom, and has been prevented from having so beneficial and healthy a use and occupation of the lands as he otherwise would have had.

(As in paras. 4 and 5 of Form No. 1, and Relief claimed.)

No. 23

FOR REMOVAL OF CONSTRUCTION INTERFERING WITH LIGHT AND AIR

In the Court of Munsif, Allahabad.

Suit No.

of 1968.

A, son of....., caste, resident of
Allahabad..... Plaintiff.

v.

A, son of, caste, resident of.....
Allahabad..... Defendant.

The plaintiff begs to state as follows :

(1) That the plaintiff is the owner of house No.....Khushal Parbate Allahabad, which has a window on the east of it, the boundaries whereof are given at the foot of the plaint.

(2) That the plaintiff has been enjoying the use of light and air, to and from his house through the window peaceably as an easement as of right without interruption for over 20 years till the date of obstruction.

(3) That on the 15th May, 1968, the defendant erected a wall on the eastern side of the plaintiff's house which has closed the said window and has thereby completely prevented and obstructed the light and air from entering into the said house by the said window. This has caused substantial damage to the plaintiff inasmuch as it interferes materially with his physical comfort and has rendered the plaintiff's house unfit for comfortable dwelling.

(4) That the said obstruction of light and air has materially diminished the value of the plaintiff's house, inasmuch as the house was formerly fetching a price of Rs. 9,000, whereas now it is only valued at Rs. 6,000.

(5) That the cause of action arose on the 15th May, 1968, when the defendant constructed the wall which has prevented the light and air coming to the plaintiff's house by the said window.

(6) That the suit is valued at Rs. 3,000, being the loss occasioned to the plaintiff by the deterioration in the value of the plaintiff's house by the aforesaid obstruction.

(7) That the suit is within the cognisance of this court.

The plaintiff claims—

(a) A mandatory injunction to the defendant to demolish so much portion of his wall as obstructs the light and air of the plaintiff.

(b) On failure to demolish the wall by the defendant the plaintiff may be allowed to demolish the same and the costs of the demolition may be added to the decree in favour of the plaintiff.

(c) Any other relief to which the plaintiff may be entitled may be granted by the court.

Verification : I, A, do verify that the facts stated in paragraphs 1 to 4 of the above plaint are true to my personal knowledge and the contents of paragraphs 5 to 7 are believed by me on information received to be correct. I append my signature to this verification at Allahabad on July 1, 1968.

Sd. A.
(Plaintiff)

Gopalji Tandon,
Advocate.
Boundary of the house.

— — —
No. 24

OBSTRUCTING A RIGHT OF WAY

(Title)

A. B., the above-named plaintiff, states as follows :

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of (a house in the village of _____).

2. He was entitled to a right of way from the (house) over a certain field to a public highway and back again from the highway over the field to the house, for himself and his servants (with vehicles, or on foot) at all times of the year.

3. On the _____ day of _____ 19, the defendant wrongfully obstructed the said way, so that the plaintiff could not pass (with vehicles or on foot, or in any manner) along the way (and has ever since wrongfully obstructed the same.)

4. (State special damage, if any.)

(As in paras. 4 and 5 of Form No. 1, and Relief claimed.)

— — —
No. 25

OBSTRUCTING A HIGHWAY

(Title)

1. The defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from _____ to _____ so as to obstruct it.

2. Thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones (or into the said trench) and broke his arm, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

(As in paras. 4 and 5 of Form No. 1, and Relief claimed.)

— — —
No. 26

DIVERTING A WATER-COURSE

(Title)

A. B., the above-named plaintiff, states as follows :

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a [stream] know as the _____, in the village of _____, district of _____.

2. By reason of such possession the plaintiff was entitled to the flow of the stream for working the mill.

3. On the _____ day of _____ 19____, the defendant, by cutting the bank of the stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill.

4. By reason thereof the plaintiff has been unable to grind more than _____ sacks per day, whereas, before the said diversion of water, he was able to grind _____ sacks per day.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

— — —
No. 27

OBSTRUCTING A RIGHT TO USE WATER FOR
IRRIGATION

(Title)

A. B., the above-named plaintiff, states as follows :

1. The plaintiff is, and was at the time hereinafter mentioned, possessed of certain lands situate, etc., and entitled to take and use a portion of the water of a certain stream for irrigating the said lands.

2. On the _____ day of _____ 19____, the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by wrongfully obstructing and diverting the said stream.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

— — —
No. 28

INJURIES CAUSED BY NEGLIGENCE ON A RAILROAD

(Title)

A. B., the above-named plaintiff, states as follows :

1. On the _____ day of _____ 19____, the defendants were common carriers of passengers by railway between _____ and.....

2. On that day the plaintiff was a passenger in one of the carriages of the defendants on the said railway.

3. While he was such passenger, at _____ station of _____ or between the stations of _____ and _____, [or near the _____], a collision occurred on the said railway caused by the negligence and unskilfulness of the defendant's servants, whereby the plaintiff was much injured (having his leg broken, his head cut, etc., and state the special damage, if any, as), and incurred expense for medical attendance and is permanently disabled from carrying on his former business as (a salesman).

(As in paras. 4 and 5 of Form No. 1, and Relief claimed.)

INJURIES CAUSED BY NEGLIGENT DRIVING

A. B., the above-named plaintiff, states as follows :

2. On the day of 19 , the plaintiff was walking southward along Chowringhee in the City of Calcutta, at about 3 o'clock in the afternoon. He was obliged to cross Middleton Street, which is a street running into Chowringhee at right angles. While he was crossing this street, and just before he could reach the foot-pavement on the further side thereof, a carriage of the defendant's, drawn by two horses under the charge and control of the defendant's servants, was negligently, suddenly and without any warning turned at a rapid and dangerous pace out of Middleton Street into Chowringhee. The pole of the carriage struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffering, and unable to attend to his business, and incurred heavy medical and other expenses and sustained great loss of business and profits.

**FOR DAMAGES ON ACCOUNT OF INJURIES
CAUSED BY NEGLIGENT DRIVING**

Suit No. _____ of 1968

VERSUS

and



1. That the plaintiff is a foreman in the service of the Leader Press,
 Alameda.

2. The defendant No. 1 is the owner of car No. U. P. C... .. and defendant No. 2 is his driver.

3. That on the 10th of April, 1968, while the plaintiff was returning to his house from the Press at about 6 in the evening and was near the Purushottam Das Park, the defendant No. 2, who was driving the car rashly, suddenly and without any warning took a wrong turn towards the right and in so doing knocked the plaintiff down and overran him by his car.

4. That in consequence of this accident the plaintiff sustained serious injuries inasmuch as he got severe bruises in his right leg and two of his teeth were knocked off. Besides these, there were four contusions on different parts of his body. All this necessitated his stay in the hospital for a month.

5. That the plaintiff has, as a result of the injuries, been permanently incapacitated and has been put to great expense in his treatment. He had to absent himself from duty on account of these injuries from the 11th of April for which he has lost his salary.

6. That the cause of action for the suit arose on the 10th of April, 1968, when the accident took place.

7. That the accident took place at Allahabad within the jurisdiction of the court.

8. That the valuation of the suit for purposes of jurisdiction and court-fee is Rs. 840.

Relief

The plaintiff, therefore, prays :

1. That a decree for Rs. 840 be awarded to him.

Particulars of Special Damage

Expenses on account of medicine ..	...Rs. 100
Room rent in the hospital for 30 days...	...Rs. 90
Food and extra nourishment...	...Rs. 100
Loss of salary for two and a half months	...Rs. 250
	<hr/>
	Rs. 540
General Damages	Rs. 300
	<hr/>
Total	Rs. 840

2. That interest *pendente lite* and future be awarded to him.

Verification.—I, A, do verify that the facts stated in paragraphs 1 to 5 of the above plaint are true to my personal knowledge and the contents of paragraphs 6 to 8 are believed by me on information received to be correct. I append my signature to this verification at Allahabad on the 30th day of June, 1968.

(Sd.) A.

(Plaintiff)

(Sd.) S. B. Misra,
Pleader,

No. 30 (1)
FOR MALICIOUS PROSECUTION
(Title)

A. B., the above-named plaintiff, states as follows :

1. On the _____ day of _____ 19____, the defendant obtained a warrant of arrest from _____ (a Magistrate of the said city, or as the case may be) on a charge of _____, and the plaintiff was arrested thereon, and imprisoned for _____ (days, or hours, and gave bail in the sum of _____ rupees to obtain his release).

2. In so doing the defendant acted maliciously and without reasonable or probable cause.

3. On the _____ day of _____ 19____, the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff.

4. Many persons, whose names are unknown to the plaintiff, hearing of the arrest, and supposing the plaintiff to be a criminal, have ceased to do business with him ; or in consequence of the said arrest, the plaintiff lost his situation as clerk to one E. F. ; or in consequence the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

(As in paras. 4 and 5 of Form No. 1, and Relief claimed).

No. 30 (2)
FOR DAMAGES FOR MALICIOUS PROSECUTION
In the Court of the Munsif of Allahabad

	Suit No. _____	of 1968	
A	...	...	...Plaintiff
	v.		
B	...	...	...Defendant

The plaintiff above-named begs to state as follows :

1. That on 13th of May, 1962, the defendant filed a complaint before the City Magistrate of Allahabad, charging the plaintiff with having burgled the defendant's house.

2. That a warrant was, in consequence of the complaint, issued for the arrest of the plaintiff, who was arrested and kept in the lock-up for a period of fifteen days.

3. That after a protracted trial on the said charge the plaintiff was acquitted on the 5th May, 1968, on the finding that the complaint was false.

4. That the defendant had made the complaint against the plaintiff maliciously and without reasonable or probable cause.

5. That by reason of the said prosecution, the plaintiff has suffered much physical and mental pain, has been lowered in the estimation of his friends, was prevented from attending to his business and incurred expenses in obtaining his release from the lock-up and defending himself from the said charge.

Particulars of Special Damage

Fee paid to Shri WY, pleader, for defence	... Rs. 300
Fee paid to his clerk	... Rs. 30
Expenses incurred in summoning three defence witnesses on two dates	... R. 50
Loss of business as a shop-keeper dealing in cloth	Rs. 200
<hr/>	
Total	Rs. 580

6. That the cause of action for the suit arose on the 5th of May, 1968, viz., the date of acquittal.

7. That the plaintiff was prosecuted in Allahabad and the defendant resides within the jurisdiction of the court.

8. That the valuation of the suit for purposes of court-fee and jurisdiction is Rs. 1,580

Relief

The plaintiff claims :

1. Rs. 1,000 as general damages for mental and bodily pain and loss of reputation.
2. Rs. 580 as special damage.
3. Interest *pendente lite* and future.

Verification.—I, A, declare that the contents of paragraphs 1 to 5 of the above plaint are true to my personal knowledge and the contents of paragraphs 6 to 8 are believed by me on information received to be correct.

Verified at Allahabad this 20th day of June, 1968.

(Sd.) A.
(Sd) S. N. Mehrotra
Advocate

No. 31

MOVABLES WRONGFULLY DETAINED

(Title)

A. B., the above-named plaintiff, states as follows :

On the day of 19 , the plaintiff owned (or state facts showing a right to the possession) the goods mentioned in the schedule hereto annexed (or describe the goods), the estimated value of which is... ..rupees.

2. From that day until the commencement of this suit the defendant has detained the same from the plaintiff.

3. Before the commencement of the suit, to wit, on the day of 19 , the plaintiff demanded the same from the defendant, but he refused to deliver them.

(As in paras. 4 and 5 of Form No. 1)

6. The plaintiff claims—

(1) delivery of the said goods, or rupees, in case delivery cannot be had ;

(2) rupees compensation for the detention thereof.

THE SCHEDULE

No. 32

AGAINST A FRAUDULENT PURCHASER AND HIS TRANSFEREE WITH NOTICE

(Title)

A. B., the above-named plaintiff, states as follows :

1. On the _____ day of _____ 19____, the defendant C. D., for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that (he was solvent, and worth _____ rupees over all the liabilities).

2. The plaintiff was thereby induced to sell and deliver to C. D. (one hundred boxes of tea), the estimated value of which is _____ rupees.

3. The said representations were false, and were then known by C. D., to be so (or at the time of making the said representations, C. D., was insolvent and knew himself to be so).

4. C. D., afterwards transferred the said goods to the defendant E. F., without consideration (or who had notice of the falsity of the representation.)

(As in paras. 4 and 5 of Form No. 1)

7. The plaintiff claims—

(1) delivery of the said goods, or _____ rupees, in case delivery cannot be had ;

(2) _____ rupees compensation for the detention thereof.

No. 33

RESCISSION OF A CONTRACT ON THE GROUND OF MISTAKE

(Title)

A. B., the above-named plaintiff, states as follows :

1. On the _____ day of _____ 19____, the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant, situated at _____, contained (ten bighas).

2. The plaintiff was thereby induced to purchase the same at the price of _____ rupees in the belief that the said representation was true, and signed an agreement, of which the original is hereto annexed. But the land has not been transferred to him.

3. On the _____ day of _____ 19____, the plaintiff paid the defendant _____ rupees as part of purchase-money.

4. That the said piece of ground contained in fact only (five bighas).

(As in paras. 4 and 5 of Form No. 1)

5. The plaintiff claims—

(1) _____ rupees, with interest from the _____ day of _____ 19____ ;

(2) that the agreement be delivered up and cancelled.

No. 34

AN INJUNCTION RESTRAINING WASTE

(Title)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is the absolute owner of (*describe the property*).
2. The defendant is in possession of the same under a lease from the plaintiff.
3. The defendant has (cut down a number of valuable trees, and threatens to cut down many more for the purposes of sale) without the consent of the plaintiff.

[As in paras. 4 and 5 of Form No. 1].

6. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.

(*Pecuniary compensation may also be claimed*).

No. 35

(Title)

INJUNCTION RESTRAINING NUISANCE

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of (the house No. _____ Street, Calcutta).

2. The defendant is, and at all the said times was, the absolute owner of (a plot of land in the same street _____).

3. On the _____ day of _____ 19____, the defendant erected upon his said plot a slaughter-house, and still maintains the same ; and from that day until the present time has continually caused cattle to be brought and killed there (and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff.)

- (4. In consequence the plaintiff has been compelled to abandon the said house, and has been unable to rent the same.)

[As in paras. 4 and 5 of Form No. 1].

7. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance.

No. 36

PUBLIC NUISANCE

(Title)

A. B., the above-named plaintiff, states as follows :—

1. The defendant has wrongly heaped up earth and stones on a public road known as _____ Street at _____ so as to obstruct the passage of the public along the same and threatens and intends, unless restrained from so doing, to continue and repeat the said wrongful act.

Not applicable where the suit is instituted by the Advocate-General.

5. The plaintiff claims—

(2) an injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid.

INJUNCTION AGAINST THE DIVERSION OF A WATER COURSE

A. B., the above-named plaintiff, states as follows :—

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid.

RESTORATION OF MOVABLE PROPERTY THREATENED WITH DESTRUCTION, AND FOR AN INJUNCTION

A. B., the above-named plaintiff, states as follows :—

2. On the _____ day of _____, 19____, he deposited the same for safe-keeping with the defendant.

4. The defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, cut or injure the same if required to deliver it up.

(As in paras. 4 and 5 of Form No. 1).

(1) that the defendant be restrained by injunction from disposing of, injuring or concealing the said [painting];

(2) that he be compelled to deliver the same to the plaintiff.

No. 39 (1)

INTERPLEADER

In the Court of the Munsif at Allahabad

Suit No. _____ of 1968

A, son of B, caste Khattri, resident of... Chowk,
Allahabad..... Plaintiff.

γ.

X, son of Y, caste Kayastha, resident of.....Katra,
Allahabad Defendant No. 1.
and

W, widow of Z, caste Kayastha, resident of...Katra,
Allahabad.....Defendant No. 2.

The plaintiff aforesaid begs to state as under :

1. That on the 15th of January, 1968, one G deposited with the plaintiff for safe custody a box of jewellery.
2. That the said G died on the 10th June, 1968.
3. That defendant No. 1 claims the said box of jewellery from the plaintiff as the adopted son of the deceased G.
4. That defendant No. 2 also lays claim to the said box as the widow of the said G and denies the adoption of defendant No. 1, X.
5. That the plaintiff is ignorant of the respective rights of the defendants.
6. That the plaintiff has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such person as the Court shall direct.
7. That there is no collusion between the plaintiff and either of the defendants.
8. That the cause of action for the suit arose on the 12th of June, 1968, when both the defendants X and W claimed the box of jewellery.
9. That the defendants reside at Allahabad, within the jurisdiction of the court.
10. That the valuation of the suit for purposes of jurisdiction is Rs. 5,000/- and the suit being for a mere declaration the plaint is stamped with a court-fee of Rs only.

Relief

It is, therefore, prayed

- (1) that the defendants be restrained by injunction from taking any proceedings against the plaintiff in relation to the said box of jewellery ;
- (2) that they be required to interplead together concerning their claims to the said box and it may be declared which of the defendants is entitled to the said box ;
- (3) that some person be authorised to receive the said box pending such litigation ; and
- (4) that upon delivering the said box to such person or depositing the same in Court, the plaintiff be discharged from all liability to either of the defendants in relation thereto.

Sd. 5A.
(Plaintiff)

I, A, declare that the contents of paragraphs 1 to 7 of the above plaint are true to my personal knowledge and the contents of paragraphs 8 to 10 are believed by me on information received to be correct.

Verified at Allahabad this 20th day of July, 1968.

Sd. Pradeep Kumar Tandon

Advocate

— — —
No. 39 (2)

INTERPLEADER

(Title)

A. B., the above-named-plaintiff, states as follows :

1. Before the date of the claims hereinafter mentioned G. H. deposited with the plaintiff [*describe the property*] for safe-keeping.

2. The defendant C. D. claims the same [under an alleged assignment thereof to him from G. H.]

3. The defendant E. F. also claims the same [under an order of G. H. transferring the same to him].

4. The plaintiff is ignorant of the respective rights of the defendants.

5. He has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such person as the Court shall direct.

6. The suit is not brought by collusion with either of the defendants.

[As in paras. 4 and 5 of Form No. 1]

9. The plaintiff claims—

(1) that the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto ;

(2) that they be required to interplead together concerning their claims to the said property ;

[(3) that some person be authorised to receive the said property pending such litigation ;]

(4) that upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto.

— — —
No. 40

EXECUTION OF TRUSTS

(Title)

A. B., the above-named plaintiff, states as follows :—

1. He is one of the trustees under an instrument of settlement bearing date on or about the.....day of.....made upon the marriage of E. F. and G. H., the father and mother of the defendant [or an instrument of transfer of the estate and effects of E. F. for the benefit of C. D., the defendant, and the other creditors of E. F.].

2. A. B. has taken upon himself the burden of the said trust, and is in possession of [or of the proceeds of] the movable and immovable property transferred by the said instrument.

3. *C. D.* claims to be entitled to a beneficial interest under the instrument.

(As in paras. 4 and 5 of Form No. 1)

6. The plaintiff is desirous to account for all the rents and profits of the said immovable property (and the proceeds of the sale of the said, or of part of the said, immovable property, or movable, or the proceeds of the sale of, or of part of, the said movable property, or the profits accruing to the plaintiff as such trustee in the execution of the said trust); and he prays that the Court will take the accounts of the said trust, and also that the whole of the trust estate may be administered in the Court for the benefit of *C. D.*, the defendant, and all other persons who may be interested in such administration, in the presence of *C. D.* and such other persons so interested as the Court may direct, or that *C. D.* may show good cause to the contrary.

[*N. B.*—Where the suit is by a beneficiary, the plaint may be modelled, *mutatis mutandis*, on the plaint by a legatee].

No. 41

FORECLOSURE OR SALE

(Title)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is mortgagee of lands belonging to the defendant.

2. The following are the particulars of the mortgage :—

(a) (date);

(b) (names of mortgagor and mortgagee);

(c) (sum secured);

(d) (rate of interest);

(e) (property subject to mortgage);

(f) (amount now due);

(g) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).

(If the plaintiff is mortgagee in possession, add).

3. The plaintiff took possession of the mortgaged property on the day of _____ and is ready to account as mortgagee in possession from the time.

(As in paras. 4 and 5 of Form No. 1)

6. The plaintiff claims—

(1) payment, or in default (sale or) foreclosure [and possession];

(Where Order 34, rule 6 applies).

(2) In case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for a decree for the balance.

No. 42

REDEMPTION

(Title)

A. B., the above-named plaintiff states as follows :—

1. The plaintiff is mortgagor of lands of which the defendant is mortgaged.

2. The following are the particulars of the mortgage :—

(a) (date) ;

(b) (names of mortgagor and mortgagee) ;

(c) (sum secured) ;

(d) (rate of interest) ;

(e) (property subject to mortgage) ;

(f) (if the plaintiff's title is derivative, state shortly the transfer or devolution under which he claims).

(If the defendant is mortgagee in possession, add).

3. The defendant has taken possession (or has received the rent) of the mortgaged property.

(As in paras. 4 and 5 of Form No. 1)

6. The plaintiff claims to redeem the said property and to have the same reconveyed to him (and to have possession thereof).

SPECIFIC PERFORMANCE (No. 1)

(Title)

A. B., the above-named plaintiff, states as follows :—

1. By an agreement dated the _____ day of _____ and signed by the defendant, he contracted to buy of (or sell to) the plaintiff certain immovable property therein described and referred to for the sum of rupees.

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so.

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

(As in paras. 4 and 5 of Form No. 1)

6. The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property (or to accept a transfer and possession of the said property) and to pay the costs of the suit.

No. 44

SPECIFIC PERFORMANCE (NO. 2)

(Title)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19____, the plaintiff and defendant entered into an agreement in writing and the original document is hereto annexed.

The defendant was absolutely entitled to the immovable property described in the agreement.

2. On the _____ day of _____ 19____, the plaintiff tendered _____ rupees to the defendant, and demanded a transfer of the said property by a sufficient instrument.

3. On the _____ day of _____ 1____, the plaintiff again demanded such transfer. (*Or the defendant refused to transfer the same to the plaintiff*).

4. The defendant has not executed any instrument of transfer.

5. The plaintiff is still ready, and willing to pay the purchase money of the said property to the defendant.

(As in paras. 4 and 5 of Form No. 1)

6. The plaintiff claims—

(1) that the defendant transfers the said property to the plaintiff by a sufficient instrument (*following the terms of the agreement*);

(2) _____ rupees compensation for withholding the same.

— --
No. 45

PARTNERSHIP

(Title)

A. B., the above-named plaintiff, states as follows :—

1. He and C. D., the defendant, have been for _____ years (or months) past carrying on business together under articles of partnership in writing (*or under a deed, or under a verbal agreement*).

2. Several disputes and differences have arisen between the plaintiff and defendant as such partners whereby it has become impossible to carry on the business in partnership with advantage to the partners. [*Or the defendant has committed the following breaches of the partnership articles :—*

(1)

(2)

(3) _____].

(As in paras. 4 and 5 of Form No. 1)

5. The plaintiff claims—

(1) dissolution of the partnership ;

(2) that accounts be taken ;

(3) that a receiver be appointed.

(N. B.—In suits for the winding-up of any partnership, omit the claim for dissolution ; and instead insert a paragraph stating the facts of the partnership having been dissolved).

No. 46

**FOR RECOVERY OF MONEY PAID BY JUDGMENT
DEBTOR TO DECREE-HOLDER NOT
RECOGNISED BY THE COURT**

In the Court of Munsif, Allahabad.

Suit No.....of 1951

A, son of C, caste , resident of
Allahabad *Plaintiff*
versus

B, son of D, caste , resident of
Allahabad..... *Defendant*

The plaintiff begs to state as follows :

(1) That on January 1, 1951, the plaintiff paid Rs. 600 to the defendant in full satisfaction of the defendant's claim with regard to decree No. 138 of 1950 of the Court of the Civil Judge, Allahabad, and the defendant promised to certify the amount to that court and not to take execution of the decree.

(2) That in spite of the aforesaid satisfaction, the defendant applied on June 10, 1951, for execution of the said decree and did not give credit for the sum of Rs. 600 paid to him as aforesaid.

(3) That the court executing the defendant's decree did not recognise the said payment of Rs. 600 by the plaintiff to the defendant as the same was not certified to it.

(4) That the plaintiff had to pay on June 20, 1951, the sum of Rs. 650 being the decretal amount and costs entered in the warrant of attachment.

(5) That the cause of action arose on June 10, 1951, when the defendant applied for the execution of his decree against the plaintiff.

(6) That the suit is valued at Rs. 650 for the purposes of court-fees and jurisdiction.

(7) That the defendant resides within the local limits of the jurisdiction of this court.

Relief

The plaintiff, therefore, prays that a decree for Rs. 650 with further interest from the date of the suit to that of payment be passed in favour of the plaintiff against the defendant.

Sd. A

Verification.—I, A, do verify that the facts stated in paragraphs 1 to 4 of the above plaint are true to my personal knowledge and the contents of paragraphs 5 to 7 are believed by me on information received to be correct. I append my signature to this verification at Allahabad on the 30th day of June, 1961.

Rajesh Tandon,
Advocate.

Sd. A.
(Plaintiff)

No. 47

ON SIMPLE MORTGAGE

In the Court of the Munsif of Allahabad

Suit No of 1951

A, son of....., caste, resident ofAllahabad
.....plaintiff.

v.

B, son of, caste....., resident of.....Allahabad
..... Defendant.

The plaintiff aforesaid begs to state as follows :

(1) That the plaintiff is the mortgagee of the property sought to be sold and the defendant is the mortgagor.

(2) That the following are the particulars of the mortgage :—

(a) Date—May 10, 1943.

(b) Name of mortgagor—B.

(c) Name of mortgagee—A.

(d) Sum secured—Rs. 4,000.

(e) Rate of interest—8% per annum.

(f) Property subject to mortgage - House No...., Khushal Parvat,
Allahabad.

(g) Amount due—Rs. 4,500.

(3) That the cause of action for the suit arose on May 10, 1943, the date of the mortgage.

(4) That the property mortgaged is situate within the local limits of the jurisdiction of the court.

(5) That the valuation of the suit for purposes of jurisdiction and court-fees is Rs. 4,500.

Relief

The plaintiff claims :

(a) Payment of Rs. 4,500 with interest from the date of the suit to that of payment and in default sale of the mortgaged property detailed above.

(b) In case the proceeds of the sale are found to be sufficient for the amount due under the decree leave may be given to the plaintiff to apply for a decree for the balance under Order 34, rule 6, of the Code of Civil Procedure.

Sd. A.

Verification.—I, A, do verify that the facts stated in paragraphs 1 and 2 of the above plaint are true to my personal knowledge and the contents of paragraphs 3 to 5 are believed by me on information received to be correct. I append my signature to this verification at Allahabad on July 1, 1951.

Gopalji Tandon,
Advocate.

Sd. A.

Problems

(1) One Mangal filed a complaint under S. 426, I. P. C. against Harphul for the latter's wrongful destruction of the former's crop on the 20th of October 1954, at 4 p. m. Angnu, Sripat, Katwaru and Guneshwar were examined for the prosecution. The defendants examined Sita Ram and Ghanshiam to prove the accused's *alibi*. The Magistrate acquitted Harphul, giving him benefit of the doubtful character of the prosecution evidence.

Harphul files a suit for recovery of Rs. 500 (including Rs. 200 costs of the defence) as damages for malicious prosecution against Mangal. Plaintiff's evidence shall consist of the statements of Sitaram and Ghanshiam and the judgment of the criminal court. Defendant's evidence shall comprise testimony of Sripat, Katwaru and Guneshwar.

(a) Draw up a plaint in the suit.

(b) Draw up the written statement.

(a) In the Court of Munsif, Allahabad (Suit No. _____ of _____)

Harphul, son of Ramphul, aged 35 years, resident of....., Allahabad.

Mangal, son of Haridas, aged 46 years, resident of, Allahabad.

The plaintiff aforesaid submits as follows :

1. On the 19th of November, 1954, the defendant filed a complaint in the court of Magistrate, 1st class, Allahabad charging the plaintiff with having wrongfully destroyed the defendant's crop standing on plot No.....of village on the 20th October, 1954 at 4 p. m.

2. The defendant had brought the said charge against the plaintiff maliciously and without a reasonable and probable cause.

3. The plaintiff was tried on the said charge and was acquitted on March 14, 1955.

4. The plaintiff was prevented from attending to his business by reason of the prosecution on the said complaint. He also incurred expenses in defence besides undergoing mental and physical pain.

5. The cause of action for the suit arose within the jurisdiction of this court on the 14th of March, 1955, being the date when the plaintiff was acquitted.

6. The suit is valued at Rs. 500 for purposes of jurisdiction and the court-fee is accordingly paid on this amount.

The plaintiff prays that damages as follows be awarded to him :

(a) Rs. 20·0 general damages for mental and bodily pain and loss of reputation.

(b) Rs. 100 for loss of business.

(c) Rs. 200 special damages as detailed below :

(i) Fee paid to ...for conducting the criminal case Rs. 75.

(ii) Travelling and diet expenses of defence witnesses Rs. 50.

(iii) Miscellaneous expenses Rs. 75.

(d) Interest *pendente lite* and future.

Sd. Harphul.

I, Harphul, declare that the contents of paras. 1 to 4 are true to my personal knowledge and the contents of paras. 5 and 6 are believed by me to be true. Verified at Allahabad this.....day of

Dated : _____

(b)

In the Court of Munsif, Banaras.

Suit No. _____

of _____

Harphul,

son of....., aged....., resident of... ..Plaintiff.

v.

Mangal,

son of....., aged....., resident ofDefendant.

Written statement on behalf of the defendant aforesaid is as follows :

1. The defendant admits the allegations in paras. 1 and 3 of the plaint.
2. The defendant denies that the charge levelled by him against the plaintiff was false or without reasonable and probable cause or malicious.
3. The charge brought was true. Even if it was not so, the defendant had reasonable and probable ground for believing it to be so.
4. The damages claimed by the plaintiff are excessive.

Sd. Mangal

I, Mangal, declare that the contents of paras 1 to 4 are true to my personal knowledge. Verified at Allahabad the..... day of.....

Date.

Sd. Mangal

(2) (a) On the 15th June, 1945, A purchased a piece of land at Allahabad for Rs. 500 and constructed a house on a portion of it at a cost of Rs. 10,000 leaving a part of the land for his *sehan*. W, who is now aged 16 years, is the owner of an adjacent house. He and his widowed mother M both reside in that house. On or about the 1st of July, 1950, B constructed a *kotha* and in so doing he encroached upon 12 ft. by 6 ft. of A's land. A wants to bring a suit against B. Draft a plaint mentioning the court and place where the suit should be instituted, the grounds of attack and the relief which A should seek.

(b) Draft a written statement on behalf of B, taking all the necessary pleas.

A. (a) In the Court of Munsif West, Allahabad.

Suit No..... .. of

A, son of X, aged 39 years, resident of 19, Stanley Road, Allahabad.

v.

B, son of Ram Prasad, aged 16 years, through his guardian Shrimati Bilaso Devi, widow of Ram Prasad, resident of 18, Stanley Road, Allahabad.

The plaintiff aforesaid submits as follows :

1. On the 15th of June, 1945, the plaintiff purchased a piece of land at Allahabad shown by letters OPUV in the sketch map at the foot of the plaint for a consideration of Rs. 500 by a registered deed.

2. The plaintiff constructed a house at a cost of Rs. 10,000 in the portion OPQR and left the portion RQUV as his *sehan*.

3. The defendant is the owner of the adjoining house No. 18, Stanley Road, towards south by letters UVST in the aforesaid sketch map which is occupied by him and his mother.

4. On or about the 1st of July, 1950, the defendant constructed a *kotha* and in so doing he encroached upon the plaintiff's land. The encroached portion is shown in the sketch map by letters WXVV (1).

5. The defendant refused to vacate and threatens to continue in his act of dispossession.

6. The cause of action for the suit arose on or about the 1st of July, 1950, within the jurisdiction of the court where the property in question is situate.

7. The suit is valued at Rs. for purposes of jurisdiction and at Rs. for payment of court-fee.

Reliefs

The plaintiff claims—

(a) Possession of the land shown by letters WXVV (1) in the sketch map given at the foot of the plaint ;

(b) Demolition of the construction raised in the portion WXVV (1); and

(c) Permanent injunction restraining the defendant from interfering with plaintiff's possession over the portion WXVV (1).

Sd. A.

I, A, declare that the contents of paras, 1, 2, 3, 4, 5 and 6 are true to my personal knowledge.

Verified this day, i. e., on..... at Allahabad.

Signed A.

(Counsel)

(b) In the Court of Munsif West, Allahabad.

Suit No.....

A.....

Plaintiff

v.

B.....

Defendant

The written statement on behalf of the defendant aforesaid is as follows :

1. The defendant admits that the plaintiff purchased land near his house by a registered deed, dated the 15th of June, 1945, for a consideration of Rs. 500, but it is denied that the portion RQUV was purchased by him.

2. It is admitted that the plaintiff constructed a house at a cost of Rs. 10,000 in the portion OPQR, but it is not admitted that the portion RQUV is or ever was the *sehan* of the plaintiff.

3. The allegation in para. 3 of the plaint is admitted.

4. The defendant admits that about the month of July, 1950 he raised a *kotha* but denies that he has made any encroachment.

5. No question of defendant's ejectment arises.

Additional Pleas

1. The plaintiff is not the owner of the land shown by letters RQUV in the sketch map at the foot of the plaint.

2. The defendant built the *kotha* at a considerable expense in the presence of the plaintiff, on vacant land, in the honest belief that it has been allotted to him at the partition, and the plaintiff, while knowing that the said land had been allotted to him, and that the defendant was acting under the said honest belief, did not stop him. He is, therefore, estopped by the principle of acquiescence from having it demolished now.

3. The plaintiff has not been in possession at any time, within 13 years before the suit, and the suit is barred by Arts. 64 and 65 of the Schedule to the Indian Limitation Act, 1963.

4. The suit is bad for non-joinder of Shrimati Bilaso Devi, who, on plaintiff's own showing, occupies the house with the defendant and is a necessary party.

Sd. Shrimati Bilaso Devi,
Guardian for B
(Signed)
Dated.....

Verification

(3) Draw a plaint on behalf of members of a joint Hindu family challenging an alienation of joint family property by the Karta of the family.

In the Court of the Civil Judge, Allahabad

Suit No.....

A, son of....., age....., resident of.....Allahabad
and

B, son of....., age....., resident of..... Allahabad
Plaintiffs.

v.

1. C, son of....., age....., resident of.....Allahabad
and

2. D, son of....., age....., resident of.....Allahabad
Defendants.

The plaintiffs aforesaid submit as follows :

1. The plaintiffs are sons of defendant No. 2, and are, and have always been members of joint Hindu family with him. The said family is governed by the Mitakshara law of the Banaras School.

2. The property mentioned at the foot of the plaint is the joint family property of plaintiffs and defendant No. 2.

3. The said defendant No. 2 mortgaged the said property by a hypothecation deed, dated the 19th November, 1956, to defendant No. 1.

4. The mortgage was made without a legal necessity.

5. The antecedent debts, alleged to be the consideration of the mortgage, were incurred for immoral purposes, these having been incurred for the purposes of gambling at Diwali in October, 1956.

6. The cause of action for the suit arose within the jurisdiction of this court on the 19th November, 1956, when the defendant No. 2 mortgaged the property mentioned at the foot of the plaint to defendant No. 1.

7. The suit is valued at Rs. 10,000 for purposes of jurisdiction and the court-fee is accordingly paid on that amount.

Relief

The plaintiffs claim a declaration that the said mortgage is null and void.

(4) Draw a plaint on behalf of a member of a joint Hindu family for possession of family property sold in execution of a mortgage decree.

[Title as usual]

The plaintiffs beg to submit as follows :

1. The plaintiffs are sons of defendant No. 2, and are, and have always been, members of joint Hindu family with him. The said family is governed by the Banaras School of the Mitakshara law.

2. The property mentioned at the foot of the plaint was the joint Hindu family property of the plaintiffs along with defendant No. 2.

3. Defendant No. 2 mortgaged the said property by a deed, dated the 19th November, 1956, in favour of defendant No. 1.

4. In execution of a decree for sale obtained by defendant No. 1 against defendant No. 2 the said property was sold and purchased by defendant No. 3, who is in its possession as such purchaser.

5. The plaintiffs were no parties to the said decree in pursuance of which the said property was sold to defendant No. 3.

6. The mortgage was made without any legal necessity and was for immoral purposes, the defendant No. 2 had fallen in bad habits, was addicted to drinking and had kept a mistress at Allahabad named

7. The defendant No. 3 was at the time of his purchase at the auction sale aware of the facts alleged in paragraph 6, he being associated with the joint family property as its adviser.

The plaintiffs therefore pray—

1. That the said mortgage and the said decree and sale be declared to be null and void.

2. That they be restored to possession of the said property.

(5) Draw a plaint on behalf of members of a joint Hindu family praying for setting aside an alienation made by one member of a family.

In the Court of the Civil Judge, Allahabad

Suit No

1. A...

2. B

3. C...

Plaintiffs

v.

1. X...

2. D...

Defendants

The plaintiffs aforesaid beg to submit as follows :

1. The three plaintiffs Nos. 1 to 3, and defendant No. 2, D, are brothers and form, and have always formed, a joint Hindu family under the Banaras School of the Mitakshara Law.

2. The house detailed at the foot of the plaint is the ancestral property of the plaintiffs and defendant No. 2, D.

3. Defendant No. 2 purported to sell the said house detailed at the foot of the plaint to defendant No. 1, by the sale deed, dated the 19th November, 1956.

4. The cause of action for the suit arose within the jurisdiction of this court on the 19th November, 1956, when defendant No. 2 purported to sell the property to defendant No. 1.

5. The suit is valued at Rs. 10,000 for purposes of jurisdiction and the court-fee is accordingly paid on that amount.

The plaintiffs claim—

(1) that it be declared that the said sale, dated the 19th of November, 1956, is null and void and possession be restored to them ;

(2) that, in the alternative, if defendant No. 2 be found to be separate from the plaintiffs, recovery of the 3/4ths share of the plaintiffs be ordered to them.

General Defences

The defendant denies that he made the contract alleged or any contract with the plaintiff.

The defendant denies that he contracted with the plaintiff as alleged or at all.

The defendant admits assets but not the plaintiff's claim.

The defendant denies that the plaintiff sold to him the goods mentioned in the plaint or any of them.

Limitation. The suit is barred by article or article of the Schedule to the Indian Limitation Act, 1963.

Jurisdiction. The Court has no jurisdiction to hear the suit on the ground that (*set forth the grounds*).

On the day of a diamond ring was delivered by the defendant to and accepted by the plaintiff in discharge of the alleged cause of action.

WRITTEN STATEMENTS

GENERAL DEFENCES

- Denial.** The defendant denies that (*set out facts*).
 The defendant does not admit that (*set out facts*).
 The defendant admits that but
- Protest.** The defendant denies that he is a partner in the defendant firm •
 of
- Insolvency.** The defendant has been adjudged an insolvent.
 The plaintiff before the institution of the suit was adjudged
 an insolvent and the right to sue vested in the receiver.
- Minority.** The defendant was a minor at the time of making the alleged
 contract.
- Payment into Court.** The defendant as to the whole claim (*or as*
 to Rs. part of the money claimed, *or as the case may*
be) has paid into Court Rs. and says that this
 sum is enough to satisfy the plaintiff's claim (*or the part afore-*
said.)
- Performance remitted.** The performance of the promise alleged was remitted
 on the (*date*)
- Rescission.** The contract was rescinded by agreement between the plaintiff
 and defendant.
- Res judicata.** The plaintiff's claim is barred by the decree in suit (*give the*
reference).
- Estoppel.** The plaintiff is estopped from denying the truth of (*insert state-*
ment as to which estoppel is claimed because (here state the facts
relied on as creating the estoppel.))
- Grounds of defence subsequent to institution of suit.** Since the institution of
 the suit, that is to say, on the day of
 (*set out facts*).

No. 1

DEFENCE IN SUITS FOR GOODS SOLD AND DELIVERED

1. The defendant did not order the goods.
2. The goods were not delivered to the defendant.
3. The price was not Rs.

(*or*)

4. } 5. } 6. }	Except as to Rs.	same as	{ 1. 2. 3.
----------------------	------------------	---------	------------------

7. The defendant [*or* A. B., the defendant's agent] satisfied the claim
 by payment before suit to the plaintiff [*or* to C. D., the plaintiff's agent] on
 the day of 19

8. The defendant satisfied the claim by payment after suit to the
 plaintiff on the day of 19

No. 2

DEFENCE IN SUITS ON BONDS

1. The bond is not the defendant's bond.
2. The defendant made payment to the plaintiff on the day according to the condition of the bond.
3. The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond.

No. 3

DEFENCE IN SUITS ON GUARANTEES

1. The principal satisfied the claim by payment before suit.
2. The defendant was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement.

No. 4

DEFENCE IN ANY SUIT FOR DEBT

1. As to Rs. 200 of the money claimed, the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff.

Particulars are as follows :

				Rs.
1907, January 25th	..	...	...	150
„ February 1st	...	...	...	50
				<hr/>
		Total	...	200
				<hr/>

2. As to the whole (or as to Rs. claimed) the defendant made tender before suit of Rs. and had paid the same into Court.

No. 5

DEFENCE IN SUITS FOR INJURIES CAUSED BY NEGLIGENT DRIVING

1. The defendant denies that the carriage mentioned in the plaint was the defendant's carriage, and that it was under the charge or control of the defendant's servants. The carriage belonged to _____ of _____ Street, Calcutta, livery stable-keepers employed by the defendant to supply him with carriages and horses ; and the person under whose charge and control the said carriage was, was the servant of the said.....

2. The defendant does not admit that the carriage was turned out of Middleton Street either negligently, suddenly or without warning, or at a rapid or dangerous pace.

3. The defendant says that the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.

4. The defendant does not admit the statements contained in the third paragraph of the plaint.

No. 6

DEFENCE IN ALL SUITS FOR WRONGS

Denial of the several acts (or matters) complained of.

No. 7

DEFENCE IN SUITS FOR DETENTION OF GOODS

1. The goods were not the property of the plaintiff.
2. The goods were detained for a lien to which the defendant was entitled.

Particulars are as follows :

1970, May 3rd. To carriage of the goods claimed from Delhi to Calcutta :—

45 maunds at Rs. 2 per maund.....Rs. 90.

No. 8

DEFENCE IN SUITS FOR INFRINGEMENT OF COPYRIGHT

1. The plaintiff is not the author (*assignee etc.*).
 2. The book was not registered.
 3. The defendant did not infringe.
-

No. 9

DEFENCE IN SUITS FOR INFRINGEMENT OF TRADE MARK

1. The trade mark is not the plaintiff's.
 2. The alleged trade mark is not a trade mark.
 3. The defendant did not infringe.
-

No. 10

DEFENCE IN SUITS RELATING TO NUISANCES

1. The plaintiff's lights are not ancient (or deny his other alleged prescriptive right.)

2. The plaintiff's lights will not be materially interfered with by the defendant's buildings.

3. The defendant denies that he or his servants pollute the water (or do what is complained of).

[If the defendant claims the rights by prescription or otherwise to do what is complained of, he must say so, and must state the grounds of the claim, i. e., whether by prescription, grant or what.]

4. The plaintiff has been guilty of laches of which the following are particulars :—

1870. Plaintiff's mill began to work.

1871. Plaintiff came into possession.

1883. First complaint.

5. As to the plaintiffs claim for damages the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff. (*If other grounds are relied on they must be stated, e. g., limitation as to past damage.*)

— — —
No. 11

DEFENCE TO SUIT FOR FORECLOSURE

1. The defendant did not execute the mortgage.
2. The mortgage was not transferred to the plaintiff (*if more than one transfer is alleged, say which is denied*).
3. The suit is barred by Article _____ of the Second Schedule to the Indian Limitation Act, No. 36 of 1963.
4. The following payments have been made, viz. :—

	Rs.
(Insert date)——	1,000
(Insert date) ——	500
5. The plaintiff took possession on the _____ of _____, and has received the rents ever since.
6. The plaintiff released the debt on the _____ of.....,
7. The defendant transferred all his interest to A. B., by a document, dated _____.

— — —
No. 12

DEFENCE TO SUIT FOR REDEMPTION

1. The plaintiff's right to redeem is barred by article _____ of the Schedule to the Indian Limitation Act, 36 of 1963.
2. The plaintiff transferred all interest in the property to A. B.
3. The defendant, by a document dated the _____ day of _____ transferred all his interest in the mortgage-debt and property comprised in the mortgage to A. B.
4. The defendant never took possession of the mortgaged property, or received the rents thereof.
(If the defendant admits possession for a time only, he should state the time, and deny possession beyond what he admits).

— — —
No. 13

DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE

1. The defendant did not enter into the agreement.
2. A. B. was not the agent of the defendant (*if alleged by plaintiff*).
3. The plaintiff has not performed the following conditions—(*Conditions*).
4. The defendant did not (*allege acts of part performance*).
5. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reason of the following matter—(*State why*).
6. The agreement is uncertain in the following respects—(*State them*).

7. (or) The plaintiff has been guilty of delay.
8. (or) The plaintiff has been guilty of fraud (or misrepresentation).
9. (or) The agreement is unfair.
10. (or) The agreement was entered into by mistake.
11. The following are particulars of (7), (8), (9), (10), (or as the case may be).

(In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches or show whatever other ground of defence he intends to rely on, e. g., the Indian Limitation Act, accord and satisfaction, release, fraud, etc).

— — —
No. 14

PARTICULARS (O. 6, R. 5)

(Title of Suit)

Particulars.—The following are the particulars of *(here states the matters in respect of which particulars have been ordered)* delivered pursuant to the order of the
of

Here set out the particulars ordered in paragraphs (if necessary).

Appendix B

PROCESS

No. 1

SUMMONS FOR DISPOSAL OF SUIT (O. 5, rr. 1, 5).

(Title)

(Name, description and place of residence)

To

WHEREAS

has instituted a suit against you for
you are hereby summoned to appear in this Court in person or by a pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions, on the _____ day of _____ 19____, at _____ o'clock in the _____ noon, to answer the claim ; and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce on that day all the witnesses upon whose evidence and all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this

day of

19____.

Seal,

Judge.

NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce, on applying to the Court and on depositing the necessary expenses.

2. If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both.

— — —
No. 2

SUMMONS FOR SETTLEMENT OF ISSUES

(O. 5, rr. 1, 5)

(Title)

To

[Name, description and place of residence]

WHEREAS

has instituted a suit against you for
you are hereby summoned to appear in this Court in person, or by a pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions, on the.....day of..... 19 , at.....O'clock in thenoon, to answer the claim ; and further you are hereby directed to file on that day a written statement of your defence and to produce on the said day all documents in your possession or power upon which you base your defence or claim for set-off or counter-claim, and where you rely on any other document whether in your possession or power or not, as evidence in support of your defence or claim for set-off or counter-claim, you shall enter such documents in a list to be annexed to the written statement.

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this...day of.....19 .
Judge.

NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, any the production of any document that you have a right to call upon the witness to produce, on applying to the Court and on depositing the necessary expenses.

2. If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both.

— — —

No. 3

SUMMONS TO APPEAR IN PERSON (O. 5, r. 3)

Title

To

*[Name, description and place of residence].***WHEREAS**

has instituted a suit against you for.....
 you are hereby summoned to appear in this Court in person on the...
 day of... 19 , at ... o'clock in the.....
 noon, to answer the claim ; and you are directed to produce on that
 day all the documents upon which you intend to rely in support of your
 defence.

Take notice that, in default of your appearance on the day before men-
 tioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this...
 day of..... 19.....

Judge.

No. 4

SUMMONS IN A SUMMARY SUIT
(Order XXXVII, rule 2)*Title*

To

(Name, description and place of residence)

WHEREAS has instituted a suit against you under Order
 XXXVII of the Code of Civil Procedure, 1908, for Rsand
 interest, you are hereby summoned to cause an appearance to be entered for
 you, within ten days from the service hereof, in default whereof the plaintiff
 will be entitled, after the expiration of the said period of ten days, to
 obtain a decree for any sum not exceeding the sum of Rs... ..and
 the sum of Rs..... for costs, together with such interest, if any, as the
 Court may order.

If you cause an appearance to be entered for you, the plaintiff will there-
 after serve upon you a summons for judgment at the hearing of which you will
 be entitled to move the Court for leave to defend the suit.

Leave to defend may be obtained if you satisfy the Court by affidavit or
 otherwise that there is a defence to the suit on the merits or that it is reason-
 able that you should be allowed to defend.

Given under my hand and the seal of the Court, this day of.....19.

Judge.

No. 4-A

SUMMONS FOR JUDGMENT IN A SUMMARY SUIT
(Order XXXVII, rule 3)

(Title)

In the..... Court, at..... Suit No..... of 19... .

X Y Z

... Plaintiff

versus

A B C

... Defendant

Upon reading the affidavit of the plaintiff the Court makes the following order, namely :—

Let all parties concerned attend the Court or Judge, as the case may be, on the..... day of..... 19 , at..... o'clock in the forenoon on the hearing of the application of the plaintiff that he be at liberty to obtain judgment in this suit against the defendant (or if against one or some or several, insert names) ... for Rs..... and for interest and costs.

Dated the..... day of ... 19.

No. 5

**NOTICE TO PERSON WHO, THE COURT CONSIDERS,
SHOULD BE ADDED AS CO-PLAINTIFF (O. 1, r. 10)**

(Title,

To

[Name, description and place of residence]

WHEREAS has instituted the above suit against..... Of..... and whereas it appears necessary that you should be added as a plaintiff in the said suit in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved.

Take notice that you should on or before the day of 19 , signify to this Court whether you consent to be so added.

GIVEN under my hand and seal of the Court, this day of 19 .
Judge.

No. 6

**SUMMONS TO LEGAL REPRESENTATIVE OF
A DECEASED DEFENDANT (O. 22, r. 6)**

(Title)

To

WHEREAS the plaintiff instituted a suit in this Court on the day of 19 , against the defendant who has since deceased and

whereas the said plaintiff has made an application to this Court alleging that you are the legal representative of the said deceased, and desiring that you be made the defendant in his stead ;

You are hereby summoned to attend in this Court on the day of 19 , at A. M. to defend the said suit and, in default of your appearance on the day specified, the said suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of...19 .

Judge.

No. 7

NOTICE TO DEFENDANT (O. 9, r. 6)

(Title)

To

[Name, description and place of residence]

WHEREAS this day was fixed for the hearing of the above suit and a summons was issued to you and the plaintiff has appeared in this Court and you did not so appear, but from the return of the Nazir it has been proved to the satisfaction of the Court that the said summons was served on you but not in sufficient time to enable you to appear and answer on the day fixed in the said summons ;

Notice is hereby given to you that the hearing of the suit is adjourned this day and that the day of 19 , is now fixed for the hearing of the same ; in default of your appearance on the day last mentioned the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 8

SUMMONS TO WITNESS (O. 16, rr. 1, 5)

(Title)

To

WHEREAS your attendance is required to on behalf of the you are hereby required [personally] to appear before this Court on the day of 19 , at in the forenoon, and to bring with you [or to send to this Court] in the above suit, o'clock Court].

A sum of Rs. _____, being your travelling and other expenses and subsistence allowance for one day, is herewith sent. If you fail to comply with this order without lawful excuse, you will be subject to the consequences of non-attendance laid down in rule 12 of Order XVI of the Code of Civil Procedure, 1908.

GIVEN under my hand and the seal of the Court, this...day of 19 .

Judge.

NOTICE.—(1) If you are summoned only to produce a document and not to give evidence, you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid.

(2) If you are detained beyond the day aforesaid, a sum of Rs. _____ will be tendered to you for each day's attendance beyond the day specified.

No. 9

WARRANT OF ATTACHMENT OF PROPERTY OF WITNESS

(O. 16, r. 10)

(Title)

To

The Bailiff of the Court.

WHEREAS the witness cited by _____ has not, after expiration of the period limited in the proclamation issued for his attendance, appeared in Court; You are hereby directed to hold under attachment _____ property belonging to the said witness to the value of _____ and to submit a return, accompanied with an inventory thereof within _____ days.

GIVEN under my hand and the seal of the Court, this _____ day of 19 .

Judge.

No. 10

WARRANT OF ARREST OF WITNESS (O. 16, r. 10)

(Title)

To

The Bailiff of the Court,

Judge.

[The defendant E. F. is required to answer the interrogatories numbered .]

[The defendant G. H. is required to answer the interrogatories numbered .]

No. 3

ANSWER TO INTERROGATORIES (O. 11, r. 9)

(Title as in No. 1, supra)

The answer of the above-named defendant *E. F.* to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named *E. F.*, make oath and say as follows :

1. { Enter answers to interrogatories in paragraphs.
2. { numbered consecutively.

3. I object to answer the interrogatories numbered _____ on the ground that [state grounds of objection].

— — —

No. 4

ORDER FOR AFFIDAVIT AS TO DOCUMENTS

(O. 11, r. 12)

(Title as in No. 1, supra)

Upon hearing _____ ; It is ordered that the _____ do within _____ days from the date of this order, answer on affidavit stating which documents are or have been in his possession or power relating to the matter in question in this suit, and that the costs of this application be.

— — —

No. 5

AFFIDAVIT AS TO DOCUMENTS (O. 11, r. 13)

(Title as in No. 1, supra)

I, the above-named defendant *C. D.*, make oath and say as follows —

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the first schedule hereto [*state grounds of Objection*].

3. I have had, but, have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

4. The lastmentioned documents were last in my possession or power on [*state when and what has become of them, and in whose possession they now are*].

5. According to the best of my knowledge, information and belief I have not now, and never had, in my possession, custody or power, or in the possession, custody or power of my pleader or agent, or in the possession, custody or power of any other person on my behalf, any account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to

the matters in question in this suit or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the said first and second schedules hereto.

No. 6

ORDER TO PRODUCE DOCUMENTS FOR INSPECTION
(O. 11, r. 14)

(Title as in No. 1, *supra*)

Upon hearing and upon reading the affidavit of filed the
day of 19; It is ordered that the do, at all
reasonable times, or reasonable notice, produce at situate at
the following documents, namely, and that the
be at liberty to inspect and peruse the documents so produced,
and to make notes of their contents. In the meantime, it is ordered that all
further proceedings be stayed and that the costs of this application be

No. 7

NOTICE TO PRODUCE DOCUMENTS (O. 11, r. 16)
(Title as in No. 1, *supra*)

Take notice that the [*plaintiff or defendant*] requires you to produce for
his inspection the following documents referred to in your (plaint or written
statement or affidavit dated the day of 19].

(Describe documents required)

X, Y, pleader for the

To Z, Pleader for the

No. 8

NOTICE TO INSPECT DOCUMENTS (O. 11, r. 17)
(Title as in No. 1, *supra*)

Take notice that you can inspect the documents mentioned in your notice
of the day of 19 [except the documents numbered
in that notice] at [insert place of inspection] on Thursday next, the
instant, between the hours of 12 and 4 o'clock.

Or, that the [*plaintiff or defendant*] objects to giving you inspection of
documents mentioned in your notice of the day of
19 , on the ground that [*state the ground*].

No. 9

NOTICE TO ADMIT DOCUMENTS (O. 12, r. 3)
(Title as in No. 1, *supra*)

Take notice that the plaintiff (*or defendant*) in this suit proposes to ad-
duce in evidence the several documents hereunder specified, and that the
same may be inspected by the defendant (*or plaintiff*), his pleader or agent,
at

on _____ between the hours of _____ ; and the defendant (*or plaintiff*), is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been ; that such as are specified as copies are true copies ; and such documents as are stated to have been served, sent or delivered were so served, sent or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this suit.

G. H., pleader (or agent) for plaintiff (or defendant).

To E. F., pleader (or agent) for defendant (or plaintiff).

(Here describe the documents and specify as to each document whether it is original or a copy).

No. 10

NOTICE TO ADMIT FACTS (O.12, r. 5)

(Title as in No. 1, supra)

Take notice that the plaintiff (*or defendant*) in this suit requires the defendant (*or plaintiff*) to admit, for the purposes of this suit only, the several facts respectively hereunder specified ; and the defendant (*or plaintiff*) is hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this suit.

G. H., pleader (or agent) for plaintiff (or defendant).

To E. F., pleader (or agent) for defendant (or plaintiff).

The facts, the admission of which required, are—

1. That *M* died on the 1st January, 1890.
2. That he died intestate.
3. That *N* was his only lawful son.
4. That *O* died on the 1st April, 1896.
5. That *O* was never married.

No. 11

ADMISSION OF FACTS PURSUANT TO NOTICE (O. 12, r. 5)

(Title as in No. 1, supra)

The defendant (*or plaintiff*) in this suit, for the purpose of this suit only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of any such facts, or any of them, as evidence in this suit :

Provided that this admission is made for the purposes of this suit only and is not an admission to be used against the defendant (*or plaintiff*) on any other occasion or by any one other than the plaintiff (*or defendant or party requiring the admission*)

*E. F., pleader (or agent) for defendant
(or plaintiff)*

To. G. H., *pleader (or agent) for plaintiff (or defendant)*

Facts admitted	Qualifications or limitations, if any, subject to which they are admitted
1. That M died on the 1st January, 1890.	1.
2. That he died intestate.	2.
3. That N was his lawful son.	3. But not that he was his only lawful son.
4. That O died.	4. But not that he died on the 1st April, 1896.
5. That O was never married.	5.

APPENDIX D

DECREES

No. 1

DECREE IN ORIGINAL SUIT (O. 20, rr. 6, 7)

(Title)

Claim for

THIS suit coming on this day for final disposal before
in the presence of
for the plaintiff and of
and decreed that
sum of Rs.
thereon at the rate of
date of realization.

for the defendant, it is ordered
and that the
to the
be paid by the
on account of the costs of the suit, with interest
per cent. per annum from this date to

GIVEN under my hand and the seal of the Court, this
of 19 . day

Judge.

Costs of Suit

Plaintiff		Defendant	
	R s. P.		Rs. P.
1. Stamp for plaint		Stamp for power ...	
2. Do for power ...		Do for petition ...	
3. Do for exhibits		Pleader's fee ...	
4. Pleader's fee on Rs.		Subsistence for witnesses	
5. Subsistence for witnesses ...		Service of process	
6. Commissioner's fee		Commissioner's fee ...	
7. Service of process			
Total ..		Total ...	

No. 2

SIMPLE MONEY DECREE

(Section 34)

(Title)

Claim for

THIS suit coming on this day for final disposal before
in the presence of
for the plaintiff and of
that the
do pay to the
with interest thereon at the rate of
per cent. per
annum from
to the date of realization of the said sum and
do also pay Rs.
thereon at the rate of
the date of realization.
, the costs of this suit, with interest
per cent. per annum from this date to

GIVEN under my hand and the seal of the Court, this
of 19 .

day
Judge.

Costs of Suit

Plaintiff		Defendant	
	Rs. Np.		Rs. Np.
1. Stamp for plaint		Stamp for power ...	
2. Do. for power ...		Do. for petition ...	
3. Do. for exhibits ...		Pleader's fee ...	
4. Pleader's fee on Rs.		Subsistence for witnesses	
5. Subsistence for witnesses ...		Service of process ...	
6. Commissioner's fee		Commissioner's fee	
7. Service of process			
Total ...		Total ...	

No. 3

PRELIMINARY DECREE FOR SALE

Grder XXXIV, rule 4—(Where accounts are directed
to be taken)

(Title)

This suit coming on this
and decreed that it be referred to
the accounts following :—

day, etc. ; It is hereby ordered
as the Commissioner to take

(i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent per annum or at such rate as the Court deems reasonable) ;

(ii) an account of the income of the mortgaged property received upto this date by the plaintiff or by any other person by the order or for use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received ;

(iii) an account of all sums of money properly incurred by the plaintiff upto this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security, together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or failing both rates, at nine per cent per annum) ;

(iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon shall first be adjusted against any sums paid by the plaintiff under clause (iii), together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(i) that the defendant do pay into Court on or before the day of or any later date upto which time for payment may be extended by the Court, such sum as the Court shall find due and the sum of Rs. for the costs of the suit awarded to the plaintiff ;

(ii) that on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit, and such costs, charges, and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the mortgage and clear of and free from all encumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property ; and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold ; and for the purposes of such sale the plaintiff shall produce before the Court, or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

6. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

7. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE

Description of the mortgaged property

NO. 3-A

PRELIMINARY DECREE FOR SALE

(Order XXXIV, Rule 4—When the Court declares
the amount due)

(Title)

This suit coming on this day, etc.; it is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated upto this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage-security, together with interest thereon, and the sum of Rs. for the costs of the suit awarded to the plaintiff, making in all the sum of Rs.

2. And it is hereby ordered and decreed as follows :

(i) that the defendant do pay into Court on or before the... day of or any later date upto which time for payment may be extended by the Court, the said sum of Rs.

(ii) that on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all encum-

branches created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property ; and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold ; and for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all document in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

5. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance ; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE

Description of the mortgaged property

— — —
No. 4

FINAL DECREE FOR SALE

(Order XXXIV, rule 5)

(Title)

Upon reading the preliminary decree passed in this suit on the
.....day of.....and further orders (if any)
dated the.....day of.....and the application
of the plaintiff dated theday of.....for a final decree and
after hearing the parties and it appearing that the payment directed by the
said decree and orders has not been made by the defendant or any person on
his behalf or any other person entitled to redeem the mortgage ;

It is hereby ordered and decreed that the mortgaged property in the
aforesaid preliminary decree mentioned or a sufficient part thereof be sold,
and that for the purposes of such sale the plaintiff shall produce before the
Court or such officer as it appoints all documents in his possession or power
relating to the mortgaged property.

And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the plaintiff for such costs of the suit including the costs of this application and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other person entitled to receive the same.

No. 5

DECREE FOR RECTIFICATION OF INSTRUMENT

(Title)

IT is hereby declared that the _____, dated the _____ day of _____ 19____, does not truly express the intention of the parties to such

And it is decreed that the said _____ be rectified by

No. 6

DECREE TO SET ASIDE A TRANSFER IN FRAUD OF CREDITORS

(Title)

IT is hereby declared that the _____, dated the _____ day of _____ 19____, and made between _____ and _____, is void as against the plaintiff and all other creditors, if any, of the defendant.

No. 7

INJUNCTION AGAINST PRIVATE NUISANCE

(Title)

LET the defendant _____, his agents, servants and workmen, be perpetually restrained from burning, or causing to be burnt, any bricks on the defendant's plot of land marked B in the annexed plan, so as to occasion a nuisance to the plaintiff as the owner or occupier of the dwelling house and garden mentioned in the plaint as belonging to and being occupied by the plaintiff.

No. 8

INJUNCTION AGAINST BUILDING HIGHER THAN OLD LEVEL

(Title)

LET the defendant _____, his contractors, agents and workmen, be perpetually restrained from continuing to erect upon the premises in _____ any house or building of a greater height than the buildings which formerly stood upon his said premises and which have been recently pulled down, so or in such manner, as to darken, injure or obstruct such of the plaintiff's windows in his said premises as are ancient lights,

No. 9

INJUNCTION RESTRAINING USE OF PRIVATE ROAD

(Title)

LET the defendant , his agents, servants and workmen, be perpetually restrained from using or permitting to be used any part of the lane at , the soil of which belongs to the plaintiff, as a carriage-way for the passage of carts, carriages or other vehicles, either going to or from the land marked B in the annexed plan or for any purpose whatsoever.

No. 10

PRELIMINARY DECREE IN A SUIT FOR DISSOLUTION
OF PARTNERSHIP AND THE TAKING OF
PARTNERSHIP ACCOUNTS

(Title)

It is declared that the proportionate shares of the parties in the partnership are as follows :—

It is declared that this partnership shall stand dissolved (or shall be deemed to have been dissolved) as from the day of ; and it is ordered that the dissolution thereof as from that day be advertised in the Gazette, etc.

And it is ordered that be the receiver of the partnership estate and effects in this suit and do get in all the outstanding book-debts and claims of the partnership.

And it is ordered that the following accounts be taken : —

1. An account of the credits, property and effects now belonging to the said partnership ;
2. An account of the debts and liabilities of the said partnership.
3. An account of all dealings and transactions between the plaintiff and defendant, from the foot of the settled account exhibited in this suit and marked (A), and not disturbing any subsequent settled accounts.

And it is ordered that the goodwill of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned and the stock-in-trade, be sold on the premises, and that the* may, on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale.

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed, before the day of , and that the* do certify the result of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of

And, lastly, it is ordered that this suit stand adjourned for making a final decree to the day of 19

*Here insert the name of the proper officer.

No. 11

FINAL DECREE IN SUIT FOR DISSOLUTION
OF PARTNERSHIP AND THE TAKING OF
PARTNERSHIP ACCOUNTS

(Title)

It is ordered that the fund now in Court, amounting to the sum of Rs.
, be applied as follows :—

1. In payment of the debts due by the partnership set forth in the certificate of the whole to Rs. *amounting in the
2. In payment of the costs of all parties in this suit, amounting to Rs. [These costs must be ascertained before the decree is drawn up.]
3. In payment of the sum of Rs. to the plaintiff as his share
of the partnership-assets, of the sum of Rs. being the residue of the said sum of Rs.
now in Court, to the defendant as his share of the partnership assets.
[Or, And that the remainder of the said sum of Rs.
be paid to the said plaintiff or (defendant) in part payment of the sum of Rs. certified to be due to him in respect of the
partnership accounts].
4. And that the defendant [or plaintiff] do on or before the day of pay to the plaintiff [or defendant] the sum of Rs.
being the balance of the said sum of Rs. due to him, which
will then remain due.

No. 12

DECREE FOR RECOVERY OF LAND AND
MESNE PROFITS

(Title)

It is hereby decreed as follows :—

1. That the defendant do put the plaintiff in possession of the property specified in the schedule hereunto annexed.
2. That the defendant do pay to the plaintiff the sum of Rs. per cent per annum to
with interest thereon at the rate of the date of realization on account of mesne profits which have accrued due
prior to the institution of the suit.
- Or
2. That an inquiry be made as to the amount of mesne profits which have accrued due prior to the institution of the suit.
3. That an inquiry be made as to the amount of mesne profits from the institution of the suit until [the delivery of possession to the decree-holder] [the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court] [the expiration of three years from the date of the decree].

Schedule

*Here insert the name of the proper officer.

APPENDIX E EXECUTION

No. 1

NOTICE TO SHOW CAUSE WHY A PAYMENT OR ADJUSTMENT SHOULD NOT BE RECORDED AS CERTIFIED

(O. 21, r. 2)

(Title)

To

WHEREAS in execution of the decree in the above-named suit the decree-holder has applied to this Court that the sum of Rs. recoverable
under the decree has been ^{paid} ~~been~~ and should be recorded as certified, this
is to give you notice that you are to appear before this Court on ^{adjusted} ~~the~~ day of 19 , to show
cause why the ^{payment} ~~the~~ aforesaid should not be recorded as
certified.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 2

PRECEPT (Section 46)

(Title)

UPON hearing the decree-holder it is ordered that this precept be sent to the Court of at under section 46 of the Code of Civil Procedure, 1908, with directions to attach the property specified in the annexed schedule and to hold the same pending any application which may be made by the decree-holder for execution of the decree.

Dated the ^{Schedule} day of 19 .

Judge.

No. 3

ORDER SENDING DECREE FOR EXECUTION TO ANOTHER COURT

(O. 21, r. 6)

(Title)

WHEREAS the decree-holder in the above suit has applied to this Court for a certificate to be sent to the Court of at for execution of the decree in the above suit by the said Court, alleging that the judgment-debtor resides or has property within the local limits of the jurisdiction of the said

Court, and it is deemed necessary and proper to send a certificate to the said Court under Order XXI, rule 6, of the Code of Civil Procedure, 1908 it is

Ordered :

That a copy of this order be sent to _____ with a copy of the decree and of any order which may have been made for execution of the same and a certificate of non-satisfaction.

Dated the _____ day of _____ 19 .

Judge.

No. 4

**ATTACHMENT IN EXECUTION
PROHIBITORY ORDER, WHERE THE PROPERTY TO
BE ATTACHED CONSISTS OF MOVABLE PROPERTY
TO WHICH THE DEFENDANT IS ENTITLED
SUBJECT TO A LIEN OR RIGHT OF SOME
OTHER PERSON TO THE IMMEDIATE
POSSESSION THEREOF**

(O. 21, r. 46)

(Title)

To

WHEREAS

has failed to satisfy a decree passed against _____ on the
day of _____ 19 , in Suit No. _____ of 19 , in favour of
for Rs. _____ ; It is ordered that the defendant be,
and is hereby, prohibited and restrained until the further order of this Court
from receiving from _____ the following property in the possession
of the said _____, that is to say, _____ to which the defendant is
entitled, subject to any claim of the said _____, and the said

is hereby prohibited and restrained, until the further order of this Court,
from delivering the said property to any person or persons whomsoever.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 5

**ATTACHMENT IN EXECUTION
PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS
OF DEBTS NOT SECURED BY NEGOTIABLE
INSTRUMENTS (O. 21, r. 46)**

(Title)

To

WHEREAS

has failed to satisfy a decree passed against _____ on the
day of _____ 19 , in Suit No. _____ of 19 , in favour
of _____ for Rs. _____ ; It is ordered that the defendant
be, and is hereby prohibited and restrained, until the further order of this

Court, from receiving from you a certain debt alleged now to be due from you to the said defendant, namely, _____ and that you, the said _____, be, and you are hereby, prohibited and restrained, until the further order of this Court, from making payment of the said debt, or any part thereof, to any person whomsoever or otherwise than into this Court.

GIVEN under my hand and the seal of the Court this
day of _____ 19 .

Judge.

No. 6

ATTACHMENT IN EXECUTION
PROHIBITORY ORDER WHERE THE PROPERTY CON-
SISTS OF SHARES IN THE CAPITAL OF A
CORPORATION

(O. 12, r. 46)

(Title)

To

Secretary of

Defendant and to
Corporation

WHEREAS _____ has failed to satisfy a decree passed
against _____ on the _____ day of _____ 19 ,
in Suit No. _____ of 19 , in favour of _____, for Rs. _____
It is ordered that you, the defendant, be, and you are hereby prohibited and
restrained, until the further order of this Court, from making any transfer of
shares in the aforesaid Corporation, namely, _____,
or from receiving payment of any dividends thereon, and you,
the Secretary of the said Corporation, are hereby prohibited and restrained
from permitting any such transfer or making any such payment.

GIVEN under my hand and the seal of the Court, this
day of _____ 19 .

Judge.

No. 7

ORDER TO ATTACH SALARY OF PUBLIC OFFICER OR
SERVANT TO RAILWAY COMPANY OR LOCAL
AUTHORITY (O. 21, r. 48).

(Title)

To

WHEREAS _____ judgment-debtor in the above-named case, is a (*describe office of Judgment debtor*) receiving his salary (*or* allowances) at your hands ; and whereas _____, decree-holder in the said case has applied in this Court for the attachment of the salary (*or* allowances) of the said _____ to the extent of _____ due to him under the decree ; You are hereby required to withhold the said sum of _____ from the salary of the said _____ in monthly instalments of _____ and to remit the said sum (*or* monthly instalments) to this Court.

GIVEN under my hand and the seal of the Court, this
day of _____ 19 .

Judge.

No. 8

ORDER OF ATTACHMENT OF NEGOTIABLE
INSTRUMENT (O. 21, r. 51)

(Title)

To

The Bailiff of the Court.

WHEREAS an order has been passed by this Court on the
day of 19 , for the attachment of ; You are
hereby directed to seize the said and bring the same into Court.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 9

ATTACHMENT
PROHIBITORY ORDER WHERE THE PROPERTY CONSISTS
OF MONEY OR OF ANY SECURITY IN THE
CUSTODY OF A COURT OF JUSTICE OR
PUBLIC OFFICER, (O. 21, r. 52)

(Title)

To

Sir,

The plaintiff having applied, under rule 52 of Order XXI of the Code of Civil Procedure, 1908, for an attachment of certain money now in your hands (*here state how the money is supposed to be in the hands of the person addressed, on what account, etc.*). I request that you will hold the said money subject to the further order of this Court.

I have the honour to be,

SIR,

Your most obedient servant,

Judge.

Dated the day of 19 .

No. 10

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT
BE SET ASIDE (O. 21, rr. 90, 92)

(Title)

To

WHEREAS the under-mentioned property was sold on the
day of 19 , in execution of the decree passed in the above-
named suit, and whereas , the decree-holder [*or judgment-*
debtor] has applied to this Court to set aside the sale of the said property on
the ground of a material irregularity [*or fraud*] in publishing [*or conducting*]
the sale, namely, that —

Take notice that if you have any cause to show why the said application
should not be granted, you should appear with your proofs in this Court on
the day of 19 , when the said application
will be heard and determined.

should not furnish security to the amount of Rs. for his personal appearance before the Court, until such time as the said suit shall be fully and finally disposed of ; and until satisfaction of any decree that may be passed against him in the suit.

GIVEN under my hand and the seal of the Court, this...day of 19 .
Judge.

— — — — —
No. 2

SECURITY FOR APPEARANCE OF A DEFENDANT
ARRESTED BEFORE JUDGMENT

(O. 38, r. 2)

(Title)

WHEREAS at the instance of , the plaintiff in the above suit,
the defendant, has been arrested and brought before
the Court ;

And whereas on the failure of the said defendant to show cause why he should not furnish security for his appearance, the Court has ordered him to furnish such security :

Therefore, I have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall appear at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the said suit, and in default of such appearance I bind myself, my heirs and executors, to pay to the said Court, at its order, any sum of money that may be adjudged against the said defendant in the said suit.

Witness my hand at this day of . 19 .

Witnesses

(Signed)

1.

2.

— — — — —
No. 3

TEMPORARY INJUNCTION (O. 39, r. 1)

(Title)

Upon motion made unto this Court by , Pleader of [or Counsel for] the plaintiff A. B., and upon reading the petition of the said plaintiff in this matter filed [this day] [or the plaint filed in this suit on the day of , or the written statement of the said plaintiff filed on the day of] and upon hearing the evidence of and in support thereof [if after notice and defendant not appearing ; add, and also the evidence of as to service of notice of this motion upon the defendant C. D.] : This Court doth order that an injunction be awarded to restrain the defendant C. D., his servants, agents and workmen, from pulling down, or suffering to be pulled down, the house in the plaint in the said suit of the plaintiff mentioned (or in the written statement, or petition, of the plaintiff and evidence at the hearing of this motion mentioned), being No. 9, Oilmongers Street, Hindupur, in the Taluk of and from selling the materials whereof the said house is composed, until the hearing of this suit or until the further order of this Court.

Dated this day of 19 .

Judge.

[Where the injunction is sought to restrain the negotiation of a note or bill, the ordering part of the order may run thus :—]

to restrain the defendants and
from parting with out of the custody of them or any of them or endorsing,
assigning or negotiating promissory note [or bill of exchange] in question,
dated on or about , etc. mentioned in the plaintiff's
plaint (or petition) and the evidence heard at this motion until the hearing of
this suit, or until the further order of this Court.

(In Copyright cases) to restrain the defendant C. D., his
servants, agents, or workmen, from printing, publishing or vending a book
called , or any part thereof, until the, etc.

(Where part only of a book is to be restrained)
to restrain the defendant C. D., his servants, agents or workmen, from
printing, publishing, selling or otherwise disposing of such parts of the book
in the plaint (or petition and evidence, etc.) mentioned to have been published
by the defendant as hereinafter specified, namely that part of the said book
which is entitled

part which is entitled and also that
tained in page (or which is con-
to page both inclusive) until , etc.

(In Patent cases) to restrain the defendant C. D., his agents,
servants and workmen, from making or vending any perforated bricks (or as
the case may be) upon the principle of the inventions in the plaint (or
petition, etc. or written statement, etc.) mentioned, belonging to the plaintiffs,
or either of them, during the remainder of the respective terms of the patents
in the plaintiff's plaint (or as the case may be) mentioned, and from counterfeit-
ing, imitating or resembling the same inventions, or either of them, or making
any addition thereto, or subtraction therefrom, until the hearing, etc.

(In case, of Trade marks) to restrain the defendant C. D.,
his servants, agents or workmen, from selling, or exposing for sale, or procur-
ing to be sold, and composition or blacking (or as the case may be) described
as or purporting to be blacking manufactured by the plaintiff A. B., in bottles
having affixed thereto such labels as in the plaintiff's plaint (or petition, etc.)
mentioned or any other labels so contrived or expressed as, by colourable
imitation or otherwise, to represent the composition or blacking sold by the
defendant to be the same as the composition or blacking manufactured and
sold by the plaintiff A. B., and from using trade cards so contrived or expressed
as to represent that any composition or blacking sold or proposed to be sold by
the defendant is the same as the composition or blacking manufactured or
sold by the plaintiff A. B., until the, etc.

(To restrain a partner from in any way interfering in the business)
to restrain the defendant C. D., his agents and servants
from entering into any contract, and from accepting, drawing, endorsing or
negotiating any bill of exchange, note or written security in the name of the
partnership-firm of B. and D., and from contracting any debt, buying and
selling any goods, and from making or entering into any verbal or written
promise, agreement or undertaking, and from doing or causing to be done.
any act in the name or on the credit of the said partnership firm of B. and D.,
or whereby the said partnership firm can or may in any manner become or
be made liable to or for the payment of any sum of money ; or for the
performance of any contract, promise or undertaking until the, etc.

No. 4

APPOINTMENT OF A RECEIVER (O. 40, r. 1)

(Title)

To

WHEREAS

has been attached in

execution of a decree passed in the above suit on the _____ day
 of _____ 19____, in favour of _____; You are hereby (subject to
 your giving security to the satisfaction of the Court) appointed receiver of the
 said property under Order XL of the Code of Civil Procedure, 1908, with full
 powers under the provisions of that Order.

You are required to render a due and proper account of your receipts
 and disbursements in respect of the said property on _____

You will be entitled to remuneration at the rate of _____
 per cent. upon your receipts under the authority of this
 appointment.

GIVEN under my hand and the seal of the Court, this
 day of _____ 19____.

Judge.

APPENDIX G

APPEAL, REFERENCE AND REVIEW

No. 1

MEMORANDUM OF APPEAL (O. 41, r. 1)

(Title)

The

above named appeals to the _____ Court at _____ from
 the decree of _____ in Suit No. _____ of 19____, dated the _____
 day of _____ 19____, and sets forth the following grounds of objection
 to the decree appealed from, namely :—

No. 2

SECURITY BOND TO BE GIVEN ON ORDER BEING MADE
TO STAY EXECUTION OF DECREE

(O. 41, r. 5)

(Title)

To

THIS security bond on stay of execution of decree executed by
 witnesseth :—

That _____, the plaintiff in Suit No. _____ of 19____, having sued _____, the defendant, in this Court and a decree having been passed on the _____ day of _____ 19____, in favour of the plaintiff, and the defendant having preferred an appeal from the said decree in the Court, the said appeal is still pending,

NOW the plaintiff decree-holder having applied to execute the decree, the defendant has made an application praying for stay of execution and has been called upon to furnish security. Accordingly I, of my own free will, stand security to the extent of Rs. _____, mortgaging the properties specified in the schedule hereunto annexed, and covenant that if the decree of the first Court be confirmed or varied by the Appellate Court the said defendant shall duly act in accordance with the decree of the Appellate Court and shall pay whatever may be payable by him thereunder, and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this _____ day of _____ 19____.

Schedule

(Signed)

Witnessed by

- 1.
- 2.

No. 3

INTIMATION TO LOWER COURT OF ADMISSION OF APPEAL (O. 41, r. 13)

(Title)

To

— You are hereby directed to take notice that _____, the _____ in the above suit, has preferred an appeal to this Court from the decree passed by you therein on the _____ day of _____ 19____.

YOU are requested to send with all practicable despatch all material papers in the suit.

Dated the _____ day of _____ 19____.

Judge.

No. 4

NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE APPEAL

(O. 41, r. 14)

(Title)

APPEAL from the _____ of the Court of _____ dated the _____ day of _____ 19____.
To _____

Respondent

TAKE notice that an appeal from the decree of _____ in this case has been presented by _____ and registered in this Court, and that the _____ day of _____ 19____, has been fixed by this Court for the hearing of this appeal.

If no appearance is made on your behalf by yourself, your pleader, or by some one by law authorized to act for you in this appeal, it will be heard and decided in your absence.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.
Judge.

(Note.—If a stay of execution has been ordered, intimation should be given of the fact on this notice.)

No. 5

NOTICE TO A PARTY TO A SUIT NOT MADE A PARTY
TO THE APPEAL BUT JOINED BY THE
COURT AS A RESPONDENT

(O. 41, r. 20)

(Title)

To

WHEREAS you were a party in Suit No. _____ of 19____, in the Court of _____; and whereas the _____ has preferred an appeal to this Court from the decree passed against him in the said suit and it appears to this Court that you are interested in the result of the said appeal :

This is to give you notice that this Court has directed you to be made a respondent in the said appeal and has adjourned the hearing thereof till the _____ day of _____ 19____, at _____ a. m. If no appearance is made on your behalf, on the said day and at the said hour the appeal will be heard and decided in your absence.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Judge.

No. 6

MEMORANDUM OF CROSS-OBJECTIONS

(O. 41, r. 22)

(Title)

WHEREAS the _____ has preferred an appeal to the Court at _____ from the decree of _____ in Suit No. _____ of 19____, dated the _____ day of _____ 19____, and whereas notice of the day fixed for hearing the appeal was served on the _____ day of _____ 19____, the _____ file, this memorandum of cross-objection under rule 22 of Order XLI of the Code of Civil Procedure, 1908, and sets forth the following grounds of objection to the decree appealed from, namely :—

No. 7

DECREE IN APPEAL (O. 41, r. 35)

(Title)

Appeal No. _____ of 19____, from the decree of the Court of
 dated the _____ day of _____ 19____
 Memorandum of Appeal _____ Plaintiff

v.

Defendant

The _____ above-named appeals to the _____ Court at _____ from
 the decree of _____ in the above suit, dated the _____, day of _____ 19____,
 for the following reasons, namely :—

This appeal coming on for hearing on the _____ day of _____ 19____,
 before _____, in the presence of _____ for the appellant and of _____
 for the respondent ; it is ordered—

The costs of this appeal, as detailed below, amounting to Rs. _____ are
 to be paid by _____. The costs of the original suit are to be paid by _____

GIVEN under my hand and the seal of the Court, this _____ day of _____
 19____.

Judge.

Costs of Appeal

Appellant	Amount Rs. p.	Respondent	Amount Rs. p.
1. Stamp for memo- randum of ap- peal		Stamp for power	...
			...
2. Do for power		Do for petition	...
3. Service of pro- cesses		Service of processes	
4. Pleader's fee on Rs. _____		Pleader's fee on Rs. _____	
Total...		Total...	

No. 8

APPLICATION TO APPEAL IN FORMA PAUPERIS

(O. 44, r. 1)

(Title)

I, _____ the _____ above-named, present
 the accompanying memorandum of appeal from the decree in the above suit
 and apply to be allowed to appeal as a pauper.

Annexed is a full and true schedule of all the movable and immovable property belonging to me with the estimated value thereof.

Dated the _____ day of _____ 19 .

(Signed)

Note. —Where the application is by the plaintiff he should state whether he applied and was allowed to sue in the Court of first instance as pauper.

No. 9

NOTICE OF APPEAL IN FORMA PAUPERIS

(O. 44, r. 1)

(Title)

WHEREAS the above-named _____ has applied to be allowed to appeal as a pauper from the decree in the above suit dated the _____ day of _____ 19 , and whereas the _____ day of _____ 19 has been fixed for hearing the application, notice is hereby giving to you that if you desire to show cause why the applicant should not be allowed to appeal as a pauper an opportunity will be given to you of doing so on the above-mentioned date.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 .

Judge.

No. 10

NOTICE TO SHOW CAUSE WHY A CERTIFICATE OF APPEAL TO THE SUPREME COURT SHOULD NOT BE GRANTED

(O. 45, r. 3)

(Title)

To

TAKE notice that _____ has applied to this Court for a certificate that as regards amount or value and nature the above case fulfils the requirements of section 109 of the Code of Civil Procedure, 1908, or that it is otherwise a fit one for appeal to the Supreme Court.

The _____ day of _____ 19 , is fixed for you to show cause why the Court should not grant the certificate asked for.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 .

Registrar

APPENDIX H
MISCELLANEOUS

No. 1

AGREEMENT OF PARTIES AS TO ISSUES TO
BE TRIED

(O. 14, r. 9)

(Title)

WHEREAS we, the parties in the above suit, are agreed as to the question of fact [or of law] to be decided between us and the point at issue between us is whether a claim found on a bond, dated the _____ day of _____ 19____, and filed as Exhibit _____ in the said suit, is or is not beyond the statute of limitation (or state the point at issue whatever it may be).

We, therefore, severally bind ourselves that, upon the finding of the Court in the negative [or affirmative] of such issue, will pay to the said _____ the sum of Rupees _____ (or such sum as the Court shall hold to be due thereon), and I, the said _____, will accept the said sum of Rupees _____ (or such sum as the Court shall hold to be due) in full satisfaction of my claim on the bond aforesaid [or that upon such finding I, the said _____, will do or abstain from doing, etc., etc.].

*Plaintiff.**Defendant.*

Witnesses : —

1.

2.

Dated the _____

day of _____

19 ____.

No. 2

NOTICE OF PAYMENT INTO COURT

(O. 24, r. 2)

(Title)

TAKE notice that the defendant has paid into Court Rs. _____ and says that that sum is sufficient to satisfy the plaintiff's claim in full.

*X. Y., Pleader for the defendant.**To Z., pleader for the plaintiff.*

No. 3

NOTICE TO SHOW CAUSE (GENERAL FORM)

(Title)

To

WHEREAS the above-named
has made application to this Court that

You are hereby warned to appear in this Court in person or by a pleader
duly instructed on the _____ day of _____ 19____
at _____ o'clock in the forenoon, to show cause against the
application, failing whereon, the said application will be heard and deter-
mined *ex parte*.

GIVEN under my hand and the seal of the Court, this
day of _____ 19____.

Judge.

No. 4

COMMISSION TO EXAMINE ABSENT WITNESS

(O. 26, rr. 4, 18)

(Title)

To

WHEREAS the evidence of _____ is required by the
_____ in the above suit ; and whereas _____ ; you are
requested to take the evidence on interrogatories [or *viva voce*] of such witness
, and you are hereby appointed Commissioner for that purpose.
The evidence will be taken in the presence of the parties or their agents if in
attendance, who will be at liberty to question the witness on the points speci-
fied, and you are further requested to make return of such evidence as soon as
it may be taken.

Process to compel the attendance of the witness will be issued by any
Court having jurisdiction on your application.

A sum of Rs. _____, being your fee in the above, is
herewith forwarded.

GIVEN under my hand and the seal of the Court, this
day of _____ 19____.

Judge.

LETTER OF REQUEST

(O. 26, r. 5)

(Title)

(Heading :—To the President and Judges of, etc., or as the case may be).

WHEREAS a suit is now pending in the _____ in which A. B,
is plaintiff and C. D. is defendant ; And in the said suit the plaintiff claims

(Abstract of claim.)

And whereas it has been represented to the said Court that it is necessary
for the purposes of justice and for the due determination of the matters in

dispute between the parties, that the following persons should be examined as witnesses upon oath touching such matters, that is to say :

E. F., of
G. H., of and
I. J., of

And it appearing that such witnesses are resident within the jurisdiction of your honourable Court ;

Now I , as the of the said Court, have the honour to request, and do hereby request, that for the reasons aforesaid and for the assistance of the said Court, you, as the President and Judges of the said , or some one or more of you, will be pleased to summon the said witness (and such other witnesses as the agents of the said plaintiff and defendant shall humbly request you in writing so to summon) to attend at such time and place as you shall appoint before some one or more of you or such other person as according to the procedure of your Court is competent to take the examination of witnesses, and that you will cause such witnesses to be examined upon the interrogatories which accompany this letter of request (or *viva voce*) touching the said matters in question in the presence of the agents of the plaintiff and defendant, or such of them as shall, on due notice given, attend such examination.

And I further have the honour to request that you will be pleased to cause the answers of the said witnesses to be reduced into writing, and all books, letters, papers and documents produced upon such examination to be duly marked for identification, and that you will be further pleased to authenticate such examination by the seal of your tribunal, or in such other way as is in accordance with your procedure and to return the same, together with such request in writing, if any, for the examination of other witnesses to the said Court.

(Note.—If the request is directed to a Foreign Court, the words “through the Ministry of External Affairs of the Government of India for transmission” should be inserted after the words “other witnesses” in the last line of this form.)

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